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THE ELECTRONIC MEDIA AND THE FLIGHT FROM FIRST AMENDMENT DOCTRINE: JUSTICE BREYER'S NEW BALANCING APPROACH

Jerome A. Barron*

Contemporary First Amendment issues in cases involving the electronic media transcend traditional conflicts between the government and the speaker. The speaker is not easy to identify. Listeners, programmers, and medium operators or distributors all have competing claims to First Amendment protection. To determine whose interests shall prevail, courts increasingly seek a methodology that accounts for these warring interests. Justice Breyer, along with Justice Souter and, in some respects, Justice Stevens, have been instrumental in reviving balancing as a First Amendment approach in these situations.

In two recent First Amendment cable television cases, Turner Broadcasting System, Inc. v. FCC (Turner II) (1997), and Denver Area Educational Telecommunications Consortium, Inc. v. FCC (Denver Area) (1996), Justice Breyer has written influential opinions that use this new balancing test. Traditional balancing approaches focused on balancing the interest of government against the interest of the media owner. The new balancing casts a wider net and recognizes that, in the contemporary electronic media context, many speech interests seek access. The new balancing analysis does not give primacy to one interest over another, but instead seeks to account for the multiplicity of interests and to weigh the relative strength of the competing access interests. In short, the new balancing analysis highlights the entire gamut of interests in play.

INTRODUCTION

The advent of new media necessarily changes the meaning and applicability of the Free Speech and Free Press Clauses. The distribution and audience penetration characteristics of new media have complicated legal responses to problems such as access, indecency, and obscenity. Contemporary First

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Amendment issues transcend conflicts between the government and the speaker.¹ Today, the speaker is not easy to identify.² Listeners, viewers, programmers, and medium operators all have competing claims to First Amendment protection, and their claims are not necessarily fungible.³ To determine whose interests shall prevail, courts increasingly seek a methodology that accounts for these competing interests.⁴ Justice Stephen Breyer has been instrumental in reviving the balancing approach to First Amendment claims, but his is a new kind of balancing.⁵ Justice Breyer's balancing approach focuses on access, not as a right, but as a First Amendment interest worthy of being weighed in the decisional equation.⁶

Although Justice Breyer was expected to be a leader in the fields of administrative and antitrust law, he has additionally emerged as a major jurist on First Amendment issues, in part because of his balancing approach. He has been particularly influential in cases involving the dynamic electronic media, specifically in the field of cable television.⁷ A recurring issue addressed by Justice Breyer is whether there should be a precise First Amendment standard by which to evaluate cable regulations or whether the present state of cable is still

1. See *infra* notes 58–67 and accompanying text.

2. See *id.*

3. See *id.*

4. See *id.*

5. See discussion *infra* Parts I–II.

6. An example of access as a right is seen in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), where the Supreme Court held that access to expression rights of the listeners and viewers trumped the editorial autonomy rights of the broadcaster. See *id.* at 390 (“It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.”). Justice Breyer, on the other hand, spins viewers’ need for information from a right to an interest. For example, in *Turner Broadcasting System, Inc. v. FCC*, 117 S. Ct. 1174 (1997) (*Turner II*), the concern for providing the noncable public with access to over-the-air television is discussed as a First Amendment interest, which is weighed against other competing First Amendment interests. See *id.* at 1203–05 (Breyer, J., concurring). Similarly, in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996) (*Denver Area*), Justice Breyer balances cable programmers’ interests in access to channels against cable operators’ interests in editorial control over their wires. See *id.* at 743–44.

7. See, e.g., *Turner II*, 117 S. Ct. at 1203–05 (Breyer, J., concurring in part); *Denver Area*, 518 U.S. at 743–47 (1996). Paradoxically, the debate about the nature of First Amendment protection appropriate for cable regulation may outlive cable as an important medium. Indeed, satellite television appears poised to eclipse cable television just as cable television eclipsed over-the-air broadcast television. See Brenda Dalglish, *Satellite TV Gets Lost in Space*, FIN. POST (Toronto), Sept. 13, 1997, at 13.

evolving in nature and does not warrant the selection of a general standard.⁸

In two recent First Amendment cable television cases, *Turner Broadcasting System, Inc. v. FCC (Turner II)*⁹ and *Denver Area Educational Telecommunications Consortium, Inc. v. FCC (Denver Area)*,¹⁰ Justice Breyer wrote influential opinions using a new First Amendment balancing test.¹¹ The significance of his opinions is in their caution, sensitivity to the changing media environment, and detachment from the demands of existing First Amendment doctrine.¹² Existing First

8. See, e.g., *Turner II*, 117 S. Ct. at 1204–05 (Breyer, J., concurring in part); *Denver Area*, 518 U.S. at 740.

9. 117 S. Ct. 1174 (1997).

10. 518 U.S. 727 (1996).

11. See *supra* note 7.

12. Modern First Amendment doctrine utilizes a number of methodologies. These range from categorization versus ad hoc balancing to content-based versus content-neutral methodologies. Categorization recognizes categories of speech that are either unprotected speech under the First Amendment or enjoy something less than full protection—so-called “low value” speech. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.”). According to Melville Nimmer, categories of speech are developed by definitional balancing—a general calculus of the competing interests implicated by government regulation of that category of speech. See Melville B. Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, 942–43 (1968).

An alternative to categorization is ad hoc balancing, where courts balance First Amendment interests implicated by the facts of a particular case. See, e.g., *United States v. O'Brien*, 391 U.S. 367, 376–77 (1968). Ad hoc balancing comes in a variety of forms that include strict scrutiny review—balancing the compelling government interest in regulation with the effects on the First Amendment rights of the speaker—and medium or intermediate scrutiny—upholding a government regulation when “it furthers an important or substantial governmental interest . . . and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.” *Id.* at 377. Strict scrutiny, intermediate scrutiny, and rational basis scrutiny comprise the three-tiered methodology courts currently use for First Amendment and Equal Protection analysis. See *infra* note 15 and accompanying text.

Another First Amendment methodology often utilized in conjunction with categorization and balancing focuses on the distinction between content-based and content-neutral regulations. See, e.g., *Regan v. Time, Inc.*, 468 U.S. 641, 648–49 (1984) (“Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.”). Content-based regulations are restrictions that are based on what the speaker is saying—the content of the message. See *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (holding the “Son of Sam” law, which forced publishers to place income from criminals’ books into escrow for the criminals’ victims, to be content-based). Content-neutral regulations are restrictions that may burden First Amendment interests but that are not based upon what the speaker is saying. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662–63 (1994) (*Turner I*). A high standard is required to uphold content-based restrictions: “[G]overnment must demonstrate that

Amendment doctrine, in turn, might hinder the development of a First Amendment jurisprudence as flexible and adaptable as the evolving technology that it governs.

Skepticism regarding the rigidity of modern constitutional law doctrine is not new to the Supreme Court. In *R.A.V. v. City of St. Paul*,¹³ Justice Stevens provided a devastating critique of the categorical approach to free expression problems.¹⁴ Similarly, several Supreme Court Justices have expressed longstanding skepticism as to the utility of the three-tiered standard of review in evaluating the First Amendment validity of governmental regulation.¹⁵ Thus, the

the communication falls into one of the categories of low-value speech or must justify the regulation by showing that it is necessary to a compelling governmental interest." JEROME A. BARRON & C. THOMAS DIENES, *FIRST AMENDMENT LAW IN A NUTSHELL* 28 (1993). When the regulation is deemed to be content-neutral, then courts will use a less stringent balancing test. See *Turner I*, 512 U.S. at 662.

A recent trend in First Amendment jurisprudence has been the application of the public forum doctrine, see *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 672 (1992), and its application to new media, see *Denver Area*, 518 U.S. at 791-94 (Kennedy, J., concurring in part and dissenting in part). The public forum doctrine stems from the belief that traditional public places, such as streets and parks, are "a public forum that the citizen can commandeer." Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 11-12. Although a citizen's right of access to a traditional public forum is guaranteed, the government is permitted to impose time, place, and manner restrictions on the forum's use, provided the regulations do not discriminate based on the speaker's content. See *International Soc'y*, 505 U.S. at 678-79. A more significant question the U.S. Supreme Court addressed was what government-owned or government-controlled property would constitute a public forum and how public fora were created. See *id.* (analyzing whether an airport terminal was a public forum). A finding that property is a traditional public forum or a designated public forum, a forum that the government has opened for expressive activity, subjects the government regulation to strict scrutiny analysis unless the regulation is a time, place, or manner restriction. See *id.* at 678 ("[R]egulation of speech on government property that has traditionally been available for public expression is subject to the highest scrutiny.")

13. 505 U.S. 377 (1992).

14. *Id.* at 426 (Stevens, J., concurring). Justice Stevens stated:

But this approach sacrifices subtlety for clarity and is, I am convinced, ultimately unsound. As an initial matter, the concept of "categories" fits poorly with the complex reality of expression. Few dividing lines in First Amendment law are straight and unwavering, and efforts at categorization inevitably give rise only to fuzzy boundaries. Our definitions of "obscenity," and "public forum," illustrate this all too well. The quest for doctrinal certainty through the definition of categories and subcategories is, in my opinion, destined to fail.

Id. (Stevens, J., concurring) (citations omitted).

15. See *id.*; *Simon & Schuster*, 502 U.S. at 124 (Kennedy, J., concurring). Similarly, in the Equal Protection area, Justice Marshall challenged the standards of review in his dissent in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting). Justice Marshall criticized the *Rodriguez* majority for adhering to strict categories. "The Court apparently seeks to

categories of expression may be honored more in cases of breach than in cases of observance. Only recently, in *Glickman v. Wileman Bros. & Elliott*,¹⁶ has the Court moved away from the demands of the commercial speech category and the *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*¹⁷ test by referring to the regulation at issue as traditional economic regulation.¹⁸ Such a characterization thereby allowed the regulation to be measured by the deferential rational basis test.¹⁹

Justice Breyer's balancing approach differs from existing First Amendment doctrine. A balancing of interests methodology was the Supreme Court's dominant approach to First Amendment issues in the 1950s and 1960s.²⁰ Although Justice Breyer's new balancing approach is somewhat different, the historical virtues and defects of a balancing approach remain.²¹ For example, the balancing approach's lack of predictability and precision make it attractive and adaptable to the unsettled issues created by new and poorly understood media technologies. The fact that Justice Breyer's balancing approach deems access to be a First Amendment interest does not necessarily require that the access interest prevail. Instead, such an interest might be useful in resuscitating a balancing

establish today that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review—strict scrutiny or mere rationality." *Id.* at 98 (Marshall, J., dissenting). Justice Marshall, however, recognized that flexibility in constitutional standards is necessary depending on the context of each case. "A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause." *Id.* at 98–99 (Marshall, J., dissenting). Justice Marshall believed that the severity of the review should increase depending upon the importance and proximity of the interest affected to a constitutional right. Justice Marshall stated that it was "inescapably clear that [the] Court has consistently adjusted the care with which it will review state discrimination in light of the constitutional significance of the interests affected and the invidiousness of the particular classification." *Id.* at 109 (Marshall, J., dissenting).

16. 117 S. Ct. 2130 (1997).

17. 447 U.S. 557 (1980). For a discussion of the *Central Hudson* test, see *infra* note 118.

18. See *Glickman*, 117 S. Ct. at 2142 ("In sum, what we are reviewing is a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress.").

19. See *id.*

20. See, e.g., *Dennis v. United States*, 341 U.S. 494, 501–02, 508–10 (employing balancing in both a facial and as-applied First Amendment challenge to the Smith Act, which prohibited advocating the overthrow of the United States government) (1951); discussion *infra* note 30 and accompanying text.

21. See discussion *infra* note 26.

approach for Supreme Court forays into new communications technologies.

Traditional balancing approaches weigh the interest of government against the interest of a speaker.²² Justice Breyer's balancing analysis, on the other hand, accounts for a multiplicity of interests and refuses to grant any interests special weight.²³

As we shall see, the use of a balancing test in the *Denver Area* opinions does not necessarily signify a general revival of the balancing test in First Amendment law.²⁴ The balancing in *Denver Area* is a special kind of balancing, as Justice Breyer and Justice Souter do not espouse balancing as the best of doctrinal tools to solve First Amendment issues. Instead, they espouse balancing as a default doctrinal choice for the novel and difficult problems presented by the interface of First Amendment law and new communications technologies.²⁵

The balancing chapter in the history of First Amendment doctrine has been, and continues to be, a controversial one.²⁶

22. See, e.g., *Barenblatt v. United States*, 360 U.S. 109, 126–29 (1959) (upholding the contempt conviction of a university professor who refused to disclose whether he was a member of the Communist Party); *Dennis*, 341 U.S. at 516–17 (upholding the Smith Act convictions of Communist Party members).

23. See discussion *infra* Part I.

24. See discussion *infra* Part II.

25. See *Denver Area*, 518 U.S. at 740–41 (“The history of this Court’s First Amendment jurisprudence, however, is one of continual development Over the years, this Court has restated and refined these basic First Amendment principles, adopting them more particularly to the balance of competing interests and the special circumstances of each field of application.”).

26. An early debate about the merits of First Amendment balancing is that between Laurent Frantz and Professor Wallace Mendelson. See Laurent Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962) [hereinafter Frantz, *The First Amendment*]; Wallace Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CAL. L. REV. 821 (1962).

Frantz threw the following grenade at the use of a balancing approach in a First Amendment context: “The *ad hoc* balancer’s constitution is empty until the court decides what to put into it. It does not speak until the court speaks for it. It is inherently incapable of saying anything to the judge.” Frantz, *The First Amendment*, *supra*, at 1435.

Professor Mendelson responded that absent a balancing approach, judges could hide their individual and personal rationales for an opinion in the cloak of the Constitution. See Mendelson, *supra*, at 825. Balancing compelled a judge to provide “a particularized, rational account of how he arrives at [his decisions]—more particularized and more rational at least than the familiar parade of hallowed abstractions, elastic absolutes, and selective history.” *Id.* at 825. Doubting Mendelson’s impartiality argument, Frantz criticized balancing because of its inability to quantify which interests weigh more heavily. See Laurent Frantz, *Is the First Amendment Law?—A Reply to Professor Mendelson*, 51 CAL. L. REV. 729, 748–49 (1963) [hereinafter Frantz, *A Reply*]. In addition, balancing provides no reassurance to the losing party that “the

The balancing approach had its detractors from the outset, and its advocates were not the most sensitive of First Amendment critics.²⁷ Consider the following endorsement of the balancing test from a legal educator in the 1960s, Professor Charles Nutting, in an article significantly entitled *Is the First Amendment Obsolete?*:

Actually "balancing" is the very essence of judging, because in every case there must be a determination of which of two or more conflicting interests will prevail. In private litigation, it may be the interest each litigant has or claims to have in a particular piece of property. Where government is involved usually a social interest, such as that in safety, conflicts with an individual interest such as speech. It seems much more realistic to recognize this to

judge succeeded in keeping his personal preferences out of his 'scales.'" *Id.* at 749. In a surrebuttal from which the analysis of Justices Breyer and Souter in the *Denver Area* case could take comfort, Professor Mendelson observed: "The need for judicial balancing, I suggest, results from the imperfection of mundane law. In a better world, no doubt, clear and precise legal rules would anticipate all possible contingencies." Wallace Mendelson, *The First Amendment and the Judicial Process: A Reply to Mr. Frantz*, 17 VAND. L. REV. 479, 484 (1964).

More recently, balancing and its persistence in constitutional law generally is criticized in T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987). In Richard H. Fallon, Jr., *Foreword, Implementing the Constitution*, 111 HARV. L. REV. 56 (1997), balancing is defended against the charge by Professor Aleinikoff and others that there is no "objective, external 'scale of values' upon which to weigh the competing interests." *Id.* at 79 n.133. Professor Fallon suggests that such criticism misunderstands the role of a balancing approach. *See id.* at 80.

Professor Fallon contends that balancing should be thought of as a "metaphor for . . . decision processes that call for consideration of the relative significance of a diverse array of potentially relevant factors." *Id.* (footnote omitted). It is the thesis of this Article that this highlighting of the relevant factors or, in a First Amendment context, the rivalrous First Amendment interests, is exactly the use to which Justice Breyer puts his balancing approach in *Turner II* and *Denver Area*.

The foregoing appreciation and revival of balancing is not without its critics. Professor Post has observed that it is an "unfortunate consequence of the metaphor of balancing" that the result of First Amendment cases can be viewed "as a compromise between competing interests." Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1280 (1995). Instead he contends that often the issue to be decided "is what social practice ought to be legally recognized in a particular context." *Id.* Arguably, it is precisely this latter endeavor which Justice Breyer's new balancing undertakes.

I propose that Justice Breyer's new balancing implicitly recognizes that a balancing approach is a particularly subtle means for accommodating changes in new media. Balancing is malleable because one can always add to or subtract from the interests that are weighed. New technologies are evolutionary in nature, thus creating new interests that need to be accounted for by the First Amendment. These new interests cannot be injected into nonpliant structured doctrine; rather, these interests are best accounted for by throwing them into the balancing pot.

27. *See supra* note 26.

be the case than to rely on formulae which merely conceal the true situation.²⁸

Balancing did not survive the McCarthy era with a positive reputation. Purporting to weigh objectively important liberty and security interests when applying the balancing test, courts too often placed security over liberty.²⁹ Justice Frankfurter's concurrence in *Dennis v. United States* provides a paradigm of the flaws of the balancing test of that time.³⁰ The opinion was *Gitlow v. New York* resurrected.³¹ The statute was validated provided the legislative judgment balancing the interests was deemed reasonable,³² and balancing began to be seen as a doctrinal tool for speech repression.³³

The significance of Justice Breyer's use of a balancing approach in *Denver Area* is more evident when compared to the general balancing test which served as the standard doctrinal tool in First Amendment law a generation ago. In his magisterial *The System of Freedom of Expression*, Professor Thomas Emerson summarized that balancing test: "[B]eginning with *Douglas* in 1950, the Court turned primarily to the ad hoc balancing test. The balancing test was used extensively for a decade and a half, at first with the legislative judgment given special weight and later with the First Amendment interest gaining the preference."³⁴

28. Charles B. Nutting, *Is the First Amendment Obsolete?*, 30 GEO. WASH. L. REV. 167, 173-74 (1961).

29. See Aleinikoff, *supra* note 26, at 944.

30. See *Dennis v. United States*, 341 U.S. 494, 517-56 (1951) (Frankfurter, J., concurring). Justice Frankfurter asserts that the balancing of interests should be done by Congress and not the Court. See *id.* at 525 (Frankfurter, J., concurring). Justice Frankfurter states:

Absolute rules would inevitably lead to absolute exceptions, and such exceptions would eventually corrode the rules. The demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidian problems to be solved.

Id. at 524-25 (Frankfurter, J., concurring).

31. 268 U.S. 652, 669 (1925) ("[U]tterances inciting to the overthrow of organized government by unlawful means, present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion. . . . [T]he immediate danger is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen.")

32. See *Dennis*, 341 U.S. at 501.

33. See discussion *supra* note 26.

34. THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 717 (1970).

The balancing test used by Justice Breyer, and praised by Justice Souter, is significantly different. In this new balancing approach, a legislative judgment in favor of access is ferreted out and given weight, as in *Turner II*.³⁵ As discussion of *Denver Area* illustrates, a governmental interest in suppression of expression is given less weight.³⁶

In an even more modern context, balancing has reappeared regarding indecency in the newly emergent electronic media. In *The System of Freedom of Expression*, Professor Emerson noted that the balancing test had never been suggested as a suitable doctrine or test for evaluating First Amendment challenges to obscenity regulation.³⁷ Professor Emerson observed that this may be "attributable to the fact that the balancing test is particularly unworkable because the interests of the state in prohibiting obscenity rest upon such unascertainable foundations."³⁸ In this light, it is surprising to see balancing, whether weighted towards interests or not, revived for use in the indecency context in electronic media cases. The return of balancing, however, is driven by a renewed concern for access interests, rather than indecency issues, in electronic media cases.³⁹

Part I of this Article discusses *Turner II* and focuses on Justice Breyer's development of a balancing analysis in that case. Part II discusses the *Denver Area* decision in which Justice Breyer, writing in part the opinion of the Court, again uses a balancing approach in order to resolve the competing First Amendment interests affected by the regulation of indecency on leased access and public access channels. This Part also considers how the new balancing approach uniquely weighs the access for expression aspect of a regulation against its speech suppressive aspect. Part III analyzes the varying reactions of the other Justices, specifically Justices Souter, Stevens, Kennedy, and Thomas, to the new balancing approach. Part IV considers the new balancing approach in contexts other than cable regulation. The vehicle for consideration is an Internet case, *Reno v. ACLU*,⁴⁰ involving the application of First Amendment rights to a new medium. This Part concludes that although the new balancing analysis was

35. See discussion *infra* Part I.

36. See discussion *infra* Part II.

37. See EMERSON, *supra* note 34, at 494.

38. *Id.*

39. See discussion *infra* Part IV.A, C.

40. 117 S. Ct. 2329 (1997).

not explicitly relied on in *Reno*, its approach is consistent with the results in *Denver Area* and *Turner II*. Namely, where the Court finds that the function of regulation is to preserve access, the Court is not inclined to disturb the regulation. The conclusion provides an overview of the new balancing approach and highlights the emphasis on the competing First Amendment interests of the various players over the interest of the owner of the medium.

I. THE SECOND TURNER CASE

The *Turner* cases considered the difficult First Amendment issues presented by the so-called "must-carry" provisions enacted in sections four and five of the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act).⁴¹ The must-carry provisions obligate cable television system operators to carry local commercial and noncommercial broadcast signals.⁴² The Supreme Court considered First Amendment challenges to the must-carry rules twice in the last three years.⁴³

The lower federal courts have puzzled over the must-carry issue for an even longer time.⁴⁴ These lower court decisions

41. Pub. L. No. 102-385, §§ 4-5, 106 Stat. 1460, 1471-88 (1992) (codified as amended at 47 U.S.C. §§ 534-535 (1994)). Sections four and five of the 1992 Cable Act amended the Communications Act of 1934 (Communications Act), (codified as amended at 47 U.S.C. §§ 151-614 (1994)). Within the Communications Act, the must-carry provisions are labeled as sections 614 and 615. To avoid numerical confusion, this Article will refer to the must-carry provisions by the section numbers designated in the United States Code, sections 534 and 535.

42. See 47 U.S.C. §§ 534-535. Section 534 requires cable operators to carry "local commercial television stations," which are defined by subsection (h) to include "any full power television broadcast station, other than a qualified noncommercial educational television station within the meaning of section [535]" that operates within the same television market as a cable system. *Id.* § 534. Section 535 imposes similar requirements for local "noncommercial educational television stations." *Id.* § 535. For example, if a cable operator provides forty channels of television and there are four local over-the-air broadcasters that qualify for must-carry status, the cable operator would be forced to place the broadcasters on four out of its forty channels. The result is that the cable operator is only permitted to choose the programming it desires for thirty-six channels. For a complete discussion of the must-carry requirements, an outline of the 1992 Cable Act, and Congress's purpose in adopting the 1992 Cable Act, see *Turner I*, 512 U.S. at 630-34.

43. See *Turner II*, 117 S. Ct. 1174; *Turner I*, 512 U.S. 622.

44. See, e.g., *Century Communications Corp. v. FCC*, 835 F.2d 292, 304-05 (D.C. Cir. 1987) (holding unconstitutional the must-carry rules that were revised by the FCC in response to *Quincy*); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1463 (D.C.

responded to Federal Communications Commission (FCC) attempts to enforce must-carry provisions by adopting agency rules⁴⁵ rather than, as in *Turner*, by statute. Utilizing the test formulated in *United States v. O'Brien*,⁴⁶ these rules were invalidated in *Quincy Cable TV, Inc. v. FCC* in 1985,⁴⁷ and

Cir. 1985) (holding that the must-carry rules, as then drafted and justified by the FCC, violated the First Amendment rights of cable operators).

45. See *Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems, Domestic Public Point-to-Point Microwave Radio Service for Microwave Stations Used to Relay Television Broadcast Signals to Community Antenna Television Systems*, 38 F.C.C. 683, 713-14 (1965) [hereinafter *First Report & Order*] (adoption of rules & regulations); *Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems, Domestic Public Point-to-Point Microwave Radio Service for Microwave Stations Used to Relay Television Broadcast Signals to Community Antenna Television Systems, Distribution of Television Broadcast Signals by Community Antenna Television Systems*, 2 F.C.C.2d 725, 746-47 (1966) [hereinafter *Second Report & Order*] (adoption of rules & regulations). The FCC originally imposed must-carry requirements on microwave systems used to transmit distant broadcast signals to a rural cable system. See *Carter Mountain Transmission Corp.*, 32 F.C.C. 459, 465 (1962), *aff'd*, 321 F.2d 359 (D.C. Cir. 1963). In 1966, these requirements were imposed on all cable systems that carried at least one broadcast signal, regardless of whether the signal was transmitted via microwave. See *Second Report & Order*, 2 F.C.C.2d at 752-53.

The FCC's objective in implementing must-carry was not only to protect the interests of broadcasters but also to guarantee that it met one of its "cardinal objectives: the development of a 'system of [free] local broadcasting stations, such that all communities of appreciable size [will] have at least one television station as an outlet for local self-expression.'" *Quincy*, 768 F.2d at 1439 (alteration in original) (quoting *United States v. Southwestern Cable Co.*, 392 U.S. 157, 174 (1968)). The FCC's original must-carry rules required cable operators to carry all broadcast channels that met the Commission's definition of local—in general, "signals of all commercial television stations within 35 miles of the community served by the system, other stations in the same television market (as designated by the Commission), and all stations 'significantly viewed in the community.'" *Id.* at 1440 n.12 (citing 47 C.F.R. §§ 76.5, .51, .53, .55, .57, .59, .61 (1984)). The rules did not limit the number of must-carry channels, regardless of a cable operator's capacity. See *id.* at 1440.

The D.C. Circuit decisions overruling the FCC's must-carry rules led to Congressional intervention on behalf of broadcasters and over-the-air viewers.

46. 391 U.S. 367 (1968). The *O'Brien* test allows the government to regulate speech if: 1) "it is within the constitutional power of the Government"; 2) the regulation "furthers an important or substantial governmental interest"; 3) "the government interest is unrelated to the suppression of free expression" (i.e., it is content-neutral); and 4) "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 377.

47. See *Quincy*, 768 F.2d at 1437, 1459, 1463. In *Quincy*, the D.C. Circuit rejected the argument that cable television should be subject to the same First Amendment standard as over-the-air broadcasting. See *id.* at 1448-49. Instead, the *Quincy* court analyzed whether the government regulation incidentally burdened speech or whether the regulation was intended to ban speech either directly because of its content or "indirectly by favoring certain classes of speakers." *Id.* at 1450 (quoting *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 47-48 (D.C. Cir. 1977)). Although the D.C. Circuit expressed uncertainty about whether must-carry only incidentally burdened speech, it decided to apply the *O'Brien* level of scrutiny. See *id.* at 1454-55.

revised rules were invalidated in *Century Communications Corp. v. FCC* in 1987.⁴⁸

Justice Breyer's concurrence in *Turner II* displays the unique characteristics of his evolving First Amendment standard: caution, sensitivity to new technology, and detachment from the confines of existing First Amendment doctrine.⁴⁹ In analyzing the must-carry rules, Justice Breyer, unlike the D.C. Circuit, ignored the distinction between content-based and content-neutral regulations.⁵⁰ Justice Breyer focused on the consequences of cable television on over-the-air television and the impact of these consequences on First Amendment interests.⁵¹ Must-carry is a response to cable television's penetration of the television viewing market.⁵² Today, over sixty percent of American homes receive television programming through

Judge Wright's analysis in *Quincy* is couched in cautious language that attempts to account for the unique features of cable television. *See id.* at 1448. Judge Wright expressly refused to adopt a specific standard for cable television, *see id.* at 1454; he did, however, compare cable to other media and noted similarities and differences. *See id.* at 1450-53. Judge Wright declared that the "differences in the characteristics of [cable] justify differences in the First Amendment standards applied." *Quincy*, 768 F.2d at 1448 (quoting *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969)).

In the end, Judge Wright utilized the content-based versus content-neutral methodology. In other words, he reverted to existing First Amendment doctrine, an approach Justice Breyer more recently rejected. *See discussion supra* Introduction.

48. *See Century*, 835 F.2d at 292. In *Century*, the D.C. Circuit held that the FCC's attempts to revise the must-carry rules still did not satisfy the *O'Brien* test. *See id.* at 293. Instead of setting forth a First Amendment standard for the regulation of cable, the *Century* court again sidestepped this issue by relying on *O'Brien*. *See id.* at 298.

49. *See Turner II*, 117 S. Ct. at 1203-05 (Breyer, J., concurring in part). Dissatisfaction with the existing or dominant First Amendment doctrine of an era is hardly a new phenomenon. The late Professor Melville Nimmer dealt the ad hoc balancing of his time a heavy blow in his paper advocating definitional rather than ad hoc balancing. *See Nimmer, supra* note 12, at 942-43 ("[T]he Court employs balancing not for the purpose of determining which litigant deserves to prevail in the particular case, but only for the purpose of defining which forms of speech are to be regarded as 'speech' within the meaning of the first amendment."). Professor Schlag's penetrating critique of the categorical approach to free expression problems was similarly severe. *See Pierre J. Schlag, An Attack on Categorical Approaches to Freedom of Expression*, 30 UCLA L. REV. 671, 695-96 (1983) ("[A] categorical theory which is appealing because it appears to compel results in concrete cases will not gain adherence because its normative boundaries will be too narrow."). A more recent and even more encompassing critique of First Amendment doctrine is found in Post, *supra* note 26, at 1250 (noting that modern First Amendment doctrine is superficial, internally incoherent, and fails to "facilitate constructive judicial engagement with significant contemporary social issues connected with freedom of speech"). Whether the balancing approach of Justice Breyer in the cable cases succeeds or not, I think the objective of that approach is engagement with contemporary social issues, or at least contemporary communications issues.

50. *See Turner II*, 117 S. Ct. at 1204-05 (Breyer, J., concurring in part).

51. *See id.* (Breyer, J., concurring in part).

52. *See Turner I*, 512 U.S. at 663.

subscriptions to cable television systems.⁵³ Approximately thirty percent of American homes today, in turn, receive their television programming by virtue of over-the-air television signals.⁵⁴

In *Turner II*, Justice Breyer was not troubled by whether or not the preference for local service programming is content-based.⁵⁵ Instead, adopting a pragmatic First Amendment instrumentalism, he acknowledged the First Amendment costs of must-carry rules.⁵⁶ Indeed, he was candid enough to concede that these First Amendment costs constitute a suppression of speech.⁵⁷ For Justice Breyer, however, suppression of speech with must-carry was not decisive; instead, Justice Breyer rested his decision on the idea that assuring public access to a variety of information sources was a central First Amendment value.⁵⁸

Using a balancing approach which focused on the context of the situation, Justice Breyer weighed the First Amendment

53. See Dalglish, *supra* note 7, at 13. The *Financial Post* reported that there were 96.9 million homes with TVs, 63.7 million that subscribed to cable and 30 million that could subscribe to cable but do not. See *id.* In addition, there are 3.2 million homes that are unable to subscribe to cable. See *id.*

54. See *id.*; *Turner II*, 117 S. Ct. at 1190.

55. Professor Cass Sunstein has praised and explained Justice Breyer's decision to avoid the content-based versus content-neutral dichotomy in *Turner II*: "Breyer says the First Amendment is basically about democracy. Even content-based regulation can make democracy work better. Breyer doesn't allow himself to be trapped by the categories of 'content-based' and 'content-neutral.'" Dan Trigoboff, *What Price Must Carry?: Some Say Decision Strengthens Government's Role in Regulating TV, BROADCASTING & CABLE*, Apr. 7, 1997, at 30 (quoting Cass Sunstein). Justice Breyer saw must-carry as enhancing expression more than it restricted it. See generally *Turner II*, 117 S. Ct. at 1203-05 (Breyer, J., concurring in part). Justice O'Connor, dissenting in *Turner I*, thought that one of the objectives of the must-carry obligations of the 1992 Cable Act was to preserve local service programming. See *Turner I*, 512 U.S. at 675-77 (O'Connor, J., dissenting). From a First Amendment point of view, however, she did not think this was a virtue. See *id.* (O'Connor, J., dissenting). Such an objective, she believed, constituted a content-based justification and therefore violated the First Amendment. See *id.* at 678-79 (O'Connor, J., dissenting).

56. See *Turner II*, 117 S. Ct. at 1204 (Breyer, J., concurring in part) ("I do not deny that the compulsory carriage that creates the 'guarantee' extracts a serious First Amendment price.").

57. See *id.* (Breyer, J., concurring in part) ("[Compulsory carriage] interferes with the protected interests of the cable operators to choose their own programming; it prevents displaced cable program providers from obtaining an audience; and it will sometimes prevent some cable viewers from watching what, in its absence, would have been their preferred set of programs. This 'price' amounts to a 'suppression of speech.'" (citation omitted)).

58. See *id.* (Breyer, J., concurring in part) ("Indeed, *Turner* rested in part upon the proposition that 'assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment.'" (quoting *Turner I*, 512 U.S. at 663)).

costs to the cable operator, the cable programmer, the over-the-air programmer, and the viewer.⁵⁹ For example, must-carry can override cable operators who wish to control the programming on their systems, deprive cable programmers of the audience they would otherwise have, and trump the programming choices of cable viewers.⁶⁰ In addition, countervailing First Amendment interests exist, such as the preservation of free over-the-air television for over-the-air viewers.⁶¹ One reason for preservation, in the words of Justice Breyer, is to prevent "too precipitous a decline in the quality and quantity of programming choice for an ever-shrinking non-cable-subscribing segment of the public."⁶² After weighing the "speech-restricting and speech-enhancing consequences" of must-carry, however, Justice Breyer concluded that the burden must-carry imposes on the cable system operator, potential cable programmers, and cable viewers is insubstantial when compared to the severe burden upon the over-the-air viewer.⁶³ The programming options of the cable subscriber are much more varied than the limited ones of the non-cable subscribing over-the-air viewer.⁶⁴ In essence, Justice Breyer concluded that Congress could reasonably determine that must-carry aids the over-the-air viewer more than it hurts the cable subscriber.⁶⁵ Under such circumstances, the First Amendment did not require a preference for the interests of the cable viewer.⁶⁶

In defining the interests to be balanced, Justice Breyer looked to the consequences of cable television on over-the-air broadcasters,⁶⁷ and his analysis identified at least three important consequences which would result from cable besting over-the-air broadcasting.

59. *See id.* at 1204–05 (Breyer, J., concurring in part) (analyzing the "proper fit" of the government regulation to see if it "strikes a reasonable balance between potentially speech-restricting and speech-enhancing consequences").

60. *See id.* at 1204 (Breyer, J., concurring in part).

61. *See id.* (Breyer, J., concurring in part).

62. *Id.* (Breyer, J., concurring in part).

63. *See id.* at 1204–05 (Breyer, J., concurring in part).

64. *See id.* (Breyer, J., concurring in part).

65. *See id.* (Breyer, J., concurring in part).

66. *See id.* (Breyer, J., concurring in part).

67. *See id.* (Breyer, J., concurring in part).

*A. The Economic Impact of Cable on Local
Over-the-Air Broadcasting*

Unless cable systems carry their signals, the economic viability of over-the-air broadcasters is threatened.⁶⁸ Advertisers aware of the fragmentation of the television market in a community will be less willing to pay traditional advertising rates. In addition, the traditionally small audiences of local over-the-air public broadcasters may become so small without a presence on the local cable system's channels as to become nonviable.⁶⁹ Consequently, the ability of local over-the-air viewers to receive so-called "free" television will be destroyed.

An understandable reaction to these contentions is to dismiss them in the name of technology, as one media technology is inevitably rendered obsolete by another. Over-the-air television overtook radio. Cable television overtook over-the-air television. Satellite television now threatens the penetration of cable television. Law, including constitutional law, should not block the path of technological and economic change. This response, however, ignores social and economic barriers which prevent the members of certain economic classes from utilizing the new media. Thus, the demise of free over-the-air television would result in a further divide between those who can afford access to information via cable and satellite subscription services and those who cannot.⁷⁰

68. See Brief for Intervenor-Appellees Consumer Federation of America, et al., *Turner II*, 117 S. Ct. 1174 (1997) (No. 95-992), available in 1996 WL 422149, at *5-6 ("Without access to a substantial cable audience, local broadcasters may be unfairly disadvantaged from competing with cable and from attracting the advertising needed to maintain their economic viability."); Brief for Appellees-Intervenors Association of America's Public Television Stations, et al., *Turner II*, 117 S. Ct. 1174 (1997) (No. 95-992), available in 1996 WL 432279, at *15 ("Congress was concerned that, by virtue of their bottleneck monopoly, cable operators were in a position to destroy the viability of a substantial portion of the industry, depriving viewers of the benefits of broadcast television, in all of its varied forms.")

69. See Brief for Appellees-Intervenors Association of America's Public Television Stations, et al., *Turner II*, 117 S. Ct. 1174 (1997) (No. 95-992), available in 1996 WL 432279, at *14 ("Obviously, Congress regarded public television stations as a segment of the industry that is particularly vulnerable and that should be preserved in an economically viable form, regardless of the health of commercial stations.")

70. See *Turner II*, 117 S. Ct. at 1187 (discussing Congressional concern with the disappearance of broadcast television and noting that the issue is "whether the broadcast services available to viewers [without cable] . . . are likely to be reduced to a significant extent, because of either loss of some stations altogether or curtailment of

B. Cable and Local Public Issue Programming

The second potential consequence of the rise of cable television and the declining market for local over-the-air television is that in the absence of local over-the-air television no entity will be obligated to provide programming on issues of a local nature. Under the theory of the Communications Act of 1934, local over-the-air broadcasters are licensed as trustees for their communities.⁷¹ As such, broadcasters have an obligation to present the community with information on local issues and controversies.⁷² Cable operators, in turn, are not hamstrung by a need to provide the local cable audience with information on local issues. Indeed, one of the few remaining substantive programming obligations of broadcasters in this era of deregulation is to present issue-responsive programming to their communities.⁷³

services by others'" (quoting Brief for Federal Appellees, *Turner II*, 117 S. Ct. 1174 (1997) (No. 95-992), available in 1996 WL 435560, at *28-29 n.3)).

71. See 47 U.S.C. § 309(a) (1994) ("Subject to the provisions of this section, the Commission shall determine . . . whether the public interest, convenience, and necessity will be served by the granting of such application . . ."); 47 U.S.C.A. § 309(k) (West Supp. 1998) (allowing the FCC to grant a license renewal only if it finds that the licensee "during the preceding term of its license . . . has served the public interest, convenience, and necessity").

72. See *En Banc Programming Inquiry*, 44 F.C.C. 2303, 2312 (1960) ("The principal ingredient of [the public interest] obligation consists of a diligent, positive and continuing effort by the licensee to discover and fulfill the tastes, needs and desires of his service area.").

73. Despite the broadcasting deregulation of the 1980s, broadcasters still have a "bedrock obligation" to offer issue-responsive programming. *Deregulation of Radio*, 84 F.C.C.2d 968, 977, 982 (1981), *on reconsideration*, 87 F.C.C.2d 797 (1981); see also *Main Studio and Local Public Inspection Files of Broadcast Television and Radio Stations*, 12 F.C.C.R. 6993 (1997) (rule review); *En Banc Programming Inquiry*, 44 F.C.C. at 2312. In *Monroe Communications Corp. v. FCC*, 900 F.2d 351 (D.C. Cir. 1990), the D.C. Circuit reversed an FCC decision to renew the license of a Chicago television station, Video 44. In reversing the FCC license renewal the court stated:

The Commission found that through the full final year of its license term Video 44 offered .08 percent news, 2.57 percent public affairs, and only 5.84 percent other non-entertainment programming By the very end of its license period, Video 44 had scaled back its non-entertainment programming to five hours per week and had discontinued local production. Given that the license expectancy analysis focuses on the incumbent licensee's responsiveness to the ascertained problems and needs of its community, the Commission was arbitrary in awarding Video 44 a renewal expectancy in light of record evidence of a strong downward trend in Video 44's responsiveness to community needs in the form of news and non-entertainment programming.

Whether a broadcaster has provided such programming is a factor in determining whether the broadcaster has performed in the public interest, a consideration which affects the FCC's decision to renew a broadcast license.⁷⁴ If local over-the-air broadcasters are not economically viable and go out of business, the obligation to present television programming of unique local concern to a given community will disappear as well.

This second justification for must-carry presents delicate First Amendment issues. If the justification for must-carry is to provide local issue programming, such a justification seems content-based.⁷⁵ And if it is content-based, can such a justification withstand a strict scrutiny standard of review? This issue was heavily debated in *Turner I*.⁷⁶ Justice Kennedy, writing for the Court, denied that the dominant rationale for must-carry reflected a preference for local over-the-air programming.⁷⁷ In contrast, Justice Stevens' concurrence, which constituted the critical fifth vote, acknowledged that preservation of local over-the-air programming indeed was one of the justifications for must-carry.⁷⁸

C. The Problem of Information Apartheid

By recognizing the interests of over-the-air broadcasting viewers, Justice Breyer's opinion implicitly takes into account

Id. at 356 (citations omitted).

74. See 47 U.S.C.A. § 309(k) (West Supp. 1998).

75. See *supra* note 12. In *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105 (1991), Justice Kennedy explained the rationale behind the content-based and content-neutral distinction: "[T]he government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." *Id.* at 116.

76. 512 U.S. 622 (1994).

77. See *Turner I*, 512 U.S. at 646-48.

78. See *id.* at 669, 672 n.5 (Stevens, J., concurring) (acknowledging that the government's interests in protecting "the economic viability of free local broadcast television and its ability to originate quality local programming" and "assuring the availability of a 'multiplicity of information sources' are unquestionably substantial"). Justice Stevens focuses on the bottleneck control that cable operators can exert over programming. See *id.* at 671 (Stevens, J., concurring) ("It is also clear that cable operators . . . have both the ability and the economic incentive to exploit their gatekeeper status to the detriment of broadcasters."). This bottleneck control affects not only the local broadcasters' ability to gain access to cable subscribers but also the ability of local over-the-air viewers to receive free local programming.

the disparity between people who can afford access to cable and those who cannot. The problem of information apartheid stems not only from the rise of cable television, but also from the advent of the Internet.⁷⁹ Access to the Internet typically calls for an initial investment in a personal computer and some degree of training or skill in using it. Access to cable television is easier, but it does require a subscriber fee that may be prohibitive to the poorer segments of society.

The educational and economic barriers to entry presented by these new media, paradoxically, may destroy access to the older media. For example, if the market available to local over-the-air broadcasters is too small to support it, then that substantial fraction of the public that cannot or will not subscribe to cable will be left without television. Consequently, that fraction of the public will be bereft of information on the issues confronting the local community previously available via local over-the-air broadcasters.

The Supreme Court has stated that First Amendment jurisprudence does not prefer one set of speakers over another.⁸⁰ Taken literally, this would mean that the government cannot favor local over-the-air broadcasters over cable operators. Is it also part of First Amendment jurisprudence to refuse to prefer one set of viewers over another? Arguably, cable operators and cable viewers might prefer the Playboy channel or the Fox channel, FX, to local over-the-air signals. The over-the-air

79. Information apartheid refers to the disparity in the access to information that exists between rich and poor, and black and white. The term appears to have been coined by Congressman Edward Markey (D-Mass.) who "wants to ensure that the 'tools of the information age will be accessible to every social strata and geographic region of the country and available to school districts and public libraries.'" Kim McAvoy, *Markey's Goal: Two Wires in Every House*, BROADCASTING & CABLE, Nov. 15, 1993, at 26. Numerous commentators have raised a concern that access to computers will become an essential requirement to survive in the job marketplace and society of the future. See John Eger, *Libraries Bridge the Information Gap*, SAN DIEGO UNION-TRIB., Oct. 30, 1996, at B11; Felix Gutierrez, *King's Legacy vs. Information Apartheid*, PORTLAND SKANNER, Jan. 17, 1996, at 4; Richard M. Krieg, *Signed Off Information Apartheid Blocking Black Communities*, CHI. TRIB., Oct. 23, 1995, at 15. Although the focus of most of the literature is on access to computers and the Internet, the information available on television has become significantly more diverse and informative. See Krieg, *supra*. The inability of a minority of the nation to receive any information via free television would create a communications divide among those who have access and those who do not.

80. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 18-19 (1976); cf. *CBS, Inc. v. FCC*, 453 U.S. 367, 396 (1981) (finding no "general right of access to the media"); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 375 (1969) (upholding the Fairness Doctrine, the requirement that both sides of an issue be given equal air time).

broadcast audience, however, might prefer local television to none.

Yet Justice Breyer does not believe it violates the First Amendment for the government to choose between these classes of viewers.⁸¹ In his view, it was not unreasonable for Congress to conclude that the viewing choices of the local over-the-air broadcast viewer were more restricted than those of the typical cable subscriber.⁸² When balancing the speech suppressive aspects of must-carry as it affects cable subscribers against the access interests of over-the-air viewers, Justice Breyer rules for the latter.⁸³ The cable subscriber has an ever-increasing range of programming choices while the over-the-air viewer programming choices are more restricted and will likely continue to decrease as the over-the-air market contracts.⁸⁴

Thus, the three potential consequences of cable television's besting of over-the-air broadcasting identified in this Article weigh heavily under Justice Breyer's novel balancing approach, tipping the scale in support of must-carry.

II. THE DENVER AREA CASE

A. Justice Breyer's Analysis of Section 10(a) of the 1992 Cable Act

In *Denver Area*,⁸⁵ the Supreme Court reviewed the First Amendment validity of several 1992 Cable Act provisions.⁸⁶

81. See *Turner II*, 117 S. Ct. at 1205 (Breyer, J., concurring in part).

82. Justice Breyer set forth his view of the problem in *Turner II*: "[A]s cable becomes more popular, it may well become still more restricted insofar as the over-the-air market shrinks and thereby, by itself, becomes less profitable. In these circumstances, I do not believe the First Amendment dictates a result that favors the cable viewers' interests." *Id.* at 1205 (Breyer, J., concurring in part).

83. See *id.* (Breyer, J., concurring in part).

84. See *id.* (Breyer, J., concurring in part).

85. 518 U.S. 727 (1996).

86. The *Denver Area* Court addressed a controversy that arose from regulatory access requirements enacted by Congress in the Cable Communications Policy Act of 1984 (1984 Cable Act), Pub. L. No. 98-549, 98 Stat. 2779 (codified as amended in scattered sections of 47 U.S.C.), and in the 1992 Cable Act, Pub. L. No. 102-385, 106 Stat. 1460 (codified as amended in scattered sections of 47 U.S.C.). As a general matter, cable operators determine what types of programming they are going to deliver to their subscribers over their available channels. See *Denver Area*, 118 U.S. at 737. Cable operator editorial discretion is limited, however, by two types of regulatory access requirements that resulted from political initiatives seeking to promote outside access

One of the provisions, section 10(a), authorized a cable operator to refuse to carry leased access programming deemed indecent.⁸⁷ The D.C. Circuit held that the First Amendment did not apply to section 10(a) because the censorial power was in the hands of private individuals, the cable operators, rather than the government.⁸⁸ In a plurality opinion for the Supreme Court, Justice Breyer, joined by Justices Stevens, O'Connor, and Souter, rejected the D.C. Circuit's rationale, utilized a new contextual balancing analysis, and held that section 10(a) did not violate the First Amendment.⁸⁹

The cable programmer petitioners contended otherwise,⁹⁰ and Justice Breyer summarized their argument as follows: "[C]able system operators have considerably more power to 'censor' program viewing than do broadcasters, for individual

to the cable medium. *See id.* at 788, 795 (Kennedy, J., concurring in part and dissenting in part).

The first type of access regulations require cable operators to set aside channels for "public, educational, or governmental" (PEG) programming. *See id.* at 734. In 1984, in order to further the "substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media," 1992 Cable Act, § 2(a)(7), 106 Stat. at 1461, Congress explicitly authorized local franchise authorities to require cable operators to set aside PEG channels. *See* 47 U.S.C. § 531(b) (1994). Further, Congress expressly denied the cable operator any editorial control over PEG channels, except for the broadcast of obscene material. *See id.* § 531(e).

The other type of access regulation—leased access channels, *see id.* § 532(b)(1)—provides channels that a "cable operator must set aside for unaffiliated programmers who pay to transmit shows of their own." *Denver Area*, 518 U.S. at 794–95 (Kennedy, J., concurring in part and dissenting in part). Congress also denied cable operators editorial control over leased access channels. *See* 47 U.S.C. § 532(c)(2) (1994).

87. Cable Television Consumer Protection and Competition Act of 1992 § 10(a), (codified at 47 U.S.C. § 532(h) (1994)). Section 10(a) permitted cable operators to ban leased access programming that "describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." 47 U.S.C. § 532(h).

88. *See Alliance for Community Media v. FCC*, 56 F.3d 105, 115 (D.C. Cir. 1995) (stating that the 1992 Cable Act "adjusted editorial authority between two private groups" and, therefore, did not constitute state action implicating the First Amendment).

89. *See Denver Area*, 518 U.S. at 732–33, 743–44, 768.

90. Cable operators own a network, typically composed of coaxial cable, that is used to convey television programming over a number of cable channels into subscribers' homes. *See id.* at 733. Programming is obtained from a variety of sources. "Most channels carry programming produced by independent firms, including 'many national and regional cable programming networks that have emerged in recent years,' as well as some programming that the system operator itself (or an operator affiliate) may provide." *Id.* at 733–34 (quoting *Turner I*, 512 U.S. at 629). Because of the must-carry rules that were upheld in *Turner II*, several of a cable operators' channels will receive broadcasting from local over-the-air broadcasters. Without the must-carry rules, cable operators could select to show only programming that they purchase from cable programmers, most of which are partly owned by cable operators.

communities typically have only one cable system."⁹¹ The cable operator thus controls a bottleneck. This control was the reason that "originally led government—local and federal—to insist that operators provide leased and public access channels free of operator editorial control."⁹²

Two additional arguments were lodged against authorizing cable operators to censor cable programming on leased access channels. First, cable operators are unusually dependent on government at the most basic level; they need government permission to string cable on streets and public rights of way.⁹³ Second, it is easy to argue that cable operators are not in journalism at all. Indeed, they resemble telephone companies more than newspapers or broadcasters.⁹⁴ Telephone companies are common carriers that must make lines available to all customers, despite the content of transmissions.⁹⁵ Cable systems operators, in turn, contract with cable programmers for the use of the cable operators' many channels.⁹⁶

Justice Breyer was unwilling to apply existing First Amendment doctrine to the novel problems presented by new media technologies in *Denver Area*, expressly rejecting analogizing cable television to a public forum, a common carrier, or a media owner with traditional property rights.⁹⁷ By contrast, Justices Kennedy and Thomas applied existing First Amendment categorical standards to these situations.⁹⁸ Justice Kennedy viewed access channels as common carriers.⁹⁹ He believed that cablecast is a medium protected by the First Amendment, so strict scrutiny should apply and deem section 10(a) invalid.¹⁰⁰ Justice Thomas thought First Amendment rights rest with the property owner—the cable

91. *Denver Area*, 518 U.S. at 738.

92. *Id.* (citing H.R. REP. NO. 98-934, at 30-31 (1984)).

93. *See id.* at 739.

94. *See id.*

95. *See id.* at 796 (Kennedy, J., concurring in part and dissenting in part).

96. *See id.* at 787-88 (Kennedy, J., concurring in part and dissenting in part).

97. *See id.* at 740.

98. *See id.* at 739-40 ("Justices Kennedy and Thomas would have us decide this case simply by transferring and applying literally categorical standards this Court has developed in other contexts.")

99. *See id.* at 796-98 (Kennedy, J., concurring in part and dissenting in part) ("Laws requiring cable operators to provide leased access are the practical equivalent of making them common carriers, analogous in this respect to telephone companies: They are obliged to provide a conduit for the speech of others.")

100. *See id.* at 805-07 (Kennedy, J., concurring in part and dissenting in part).

system operator.¹⁰¹ As A.J. Lieblich, the acerbic journalist and journalism critic, used to say: freedom of the press belongs to the man who owns one.¹⁰²

Breyer criticized both the Kennedy and the Thomas approaches:

Both categorical approaches suffer from the same flaws; they import law developed in very different contexts into a new and changing environment, and they lack the flexibility necessary to allow government to respond to very serious practical problems without sacrificing the free exchange of ideas the First Amendment is designed to protect.¹⁰³

Breyer rejected the straight-jacket of the three-tiered standards of review, imported from Equal Protection law, which have captured First Amendment doctrine in recent years.¹⁰⁴ Instead, he interpreted the path of First Amendment law from *Schenck v. United States*¹⁰⁵ to *Abrams v. United States*¹⁰⁶ to *Texas v. Johnson*¹⁰⁷ to *FCC v. Pacifica Foundation (Pacifica)*¹⁰⁸ as manifesting an enduring and guiding principle: "Congress may not regulate

101. See *id.* at 817, 821–24 (Thomas, J., concurring in the judgment in part and dissenting in part). Justice Thomas stated:

Because the access provisions are part of a scheme that restricts the free speech rights of cable operators, and expands the speaking opportunities of access programmers, who have no underlying constitutional right to speak through the cable medium, I do not believe that access programmers can challenge the scheme, or a particular part of it, as an abridgment of their "freedom of speech."

Id. at 823 (Thomas, J., concurring in the judgment in part and dissenting in part).

Justice Thomas focuses on the First Amendment interests of cable operators, the entity that owns the medium. Justice Thomas would not accord First Amendment significance to the interests of viewers or programmers. See discussion *infra* Part III.D.

102. A.J. Lieblich, *The Wayward Press: Do You Belong in Journalism?*, NEW YORKER, May 14, 1960, at 105.

103. *Denver Area*, 518 U.S. at 740.

104. See *id.* at 784 (Kennedy, J., concurring in part and dissenting in part).

105. 249 U.S. 47, 52 (1919) (limiting the First Amendment right of a speaker whose words cause a "clear and present danger").

106. 250 U.S. 616, 619 (1919) (following *Schenck*).

107. 491 U.S. 397, 409 (1989) (holding a flag-burning prohibition did not prevent the incitement of violence, thereby violating the First Amendment).

108. 438 U.S. 726, 745 (1978) (finding obscene speech outside First Amendment protection).

speech except in cases of extraordinary need and with the exercise of a degree of care that we have not elsewhere required."¹⁰⁹

This principle, with its phrases "extraordinary need" and "degree of care," seems to be a difficult standard to satisfy. Indeed, it resembles the strict scrutiny standard of review. The principle's demanding phraseology notwithstanding, Justice Breyer opts not to apply this standard very strictly.¹¹⁰ The First Amendment principle that Justice Breyer announces allows for exceptions and exemptions.¹¹¹ Indeed, he relies on the First Amendment exceptions that the Supreme Court has carved out in the past.¹¹² These are discrete areas where the full protection of First Amendment law has been held not to apply—fighting words,¹¹³ libel,¹¹⁴ commercial speech,¹¹⁵ and indecent speech.¹¹⁶

Brushing past the obfuscating complexities of the *Sullivan-Gertz* doctrine¹¹⁷ and the four-part *Central Hudson*

109. *Denver Area*, 518 U.S. at 740.

110. *See id.* at 743.

111. *See infra* text accompanying notes 113–120.

112. *See id.* at 740–41.

113. *See* *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (noting that "certain well-defined and narrowly limited classes of speech" such as fighting words can be punished without raising "any Constitutional problem"). In *Chaplinsky*, the Court upheld a conviction where the defendant was arrested for calling a town marshal a "God damned racketeer" and "a damned Fascist." *Id.* at 569.

R.A.V. v. City of St. Paul, 505 U.S. 377 (1992), has greatly altered the traditional view of fighting words as a completely unprotected category. Under *R.A.V.*, viewpoint discrimination by government even within the context of fighting words would be impermissible. *See id.* at 381.

114. *See* *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) ("Calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" (quoting *Chaplinsky*, 315 U.S. at 572)).

115. *See* *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 562–63 (1980) ("Nevertheless, our decisions have recognized 'the commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.' The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455–56 (1978)) (citations omitted)).

116. *See* *FCC v. Pacifica Found.*, 438 U.S. 726, 744–48 (regulating indecent speech on the radio).

117. *See* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347–48 (1974) (holding that in a libel suit a private figure plaintiff would not be required to show "actual malice" as was required for public officials and figures); *New York Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964) (requiring public officials and figures to prove "actual malice" in order to establish a claim of libel). The Court's distinction among public officials, public figures (general and limited/vortex), and private figures has created an intricate and confusing libel jurisprudence. *See* BARRON & DIENES, *supra* note 12, at 117–32.

test,¹¹⁸ Breyer argued that the Court has used a balancing test sensitive to a specific context or field, and this “guiding principle” of First Amendment case law calls for practical application rather than absolutism.¹¹⁹ Specifically, Justice Breyer asserted that this guiding principle is constantly being adapted to the “balance of competing interests and the special circumstances of each field of application.”¹²⁰

At first glance, Justice Breyer’s balancing test seems to be no better than the discredited balancing test of the *Dennis*¹²¹ era, but it is actually a new and better balancing test. As used by Justice Breyer in *Denver Area*, the new approach weighs the strength of the government interest in the suppression of expression against the strength of the government interest in access for expression.¹²² In addition, Justice Breyer declined to choose a specific standard that would predetermine such issues; for example, his balancing approach left open the question of “whether the interests of the owners of communications media always subordinate the interests of all other users of a medium.”¹²³ Thus, the access for expression dimension of the new balancing test is what makes it new and better.

Contemporary First Amendment doctrine played a much stronger role for Justice Kennedy and Justice Thomas in *Denver*

118. See *Central Hudson*, 447 U.S. at 566. The four-part analysis developed in *Central Hudson* for commercial speech cases requires that:

[Courts must] determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id.

119. See *Denver Area*, 518 U.S. at 740–41.

120. *Id.*

121. See *Dennis*, 341 U.S. at 510 (adopting Judge Learned Hand’s formulation of a balancing test for the clear and present danger doctrine, in which the court must determine “whether the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger”).

122. See *Denver Area*, 518 U.S. at 743.

123. *Denver Area*, 518 U.S. at 742–43. Justice Thomas candidly contends, as Justice Breyer notes, that the First Amendment protects the owners of the media and no one else: “Like a free-lance writer seeking a paper in which to publish newspaper editorials, a programmer is protected in searching for an outlet for cable programming, but has no free-standing First Amendment right to have that programming transmitted.” *Id.* at 817.

Area than Justice Breyer,¹²⁴ but Justice Breyer's approach outside of existing doctrine should be praised rather than criticized. Justice Breyer made a wise choice when he declined to pick and choose among various current First Amendment doctrinal alternatives and to identify one of them as the doctrine which should forever govern cable regulation.¹²⁵

In Justice Breyer's view, the provision at issue, section 10(a), effectively balanced the relevant competing interests.¹²⁶ These interests included protecting children from exposure to indecency,¹²⁷ reconciling the interests of leased access channel programmers with the editing rights of cable operators,¹²⁸ and

124. For a discussion of Justice Kennedy's *Denver Area* opinion, see discussion *infra* Part III.C. For a discussion of Justice Thomas' *Denver Area* dissent, see discussion *infra* Part III.D.

125. Justice Breyer explains his reluctance to select a definitive First Amendment standard or analogy to evaluate cable regulation as follows:

Justices Kennedy and Thomas would have us further declare which, among the many applications of the general approach that this Court has developed over the years, we are applying here. But no definitive choice among competing analogies (broadcast, common carrier, bookstore) allows us to declare a single rigid standard, good for now and for all future media and purposes. . . . [A]ware as we are of the changes taking place in the law, the technology, and the industrial structure, related to telecommunications, we believe it unwise and unnecessary definitively to pick one analogy or one specific set of words now.

Denver Area, 518 U.S. at 741-42.

126. *See id.* at 743.

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

128. *See id.* at 743-44. The utility of Justice Breyer's balancing approach is that it focuses on the First Amendment interests of all the various players in the communications process.

The balancing approach Justice Breyer develops in *Denver Area* has a First Amendment context for its focus. It is instructive to note, as Professor Fallon has pointed out, that the Supreme Court often turns to balancing in constitutional law when it wishes to undertake a multi-factored analysis:

Supreme Court judgments about which kind of [doctrinal] test to apply frequently depend on the sort of multipart assessment that the metaphor of "balancing" reflects. Such an assessment becomes necessary whenever, after the identification of a constitutional norm or value, a further question remains about how that norm or value is best implemented in light of contingent empirical conditions, institutional competencies and pathologies, and predictive judgments about the effects of alternative tests.

Fallon, *supra* note 26, at 77.

Even more directly descriptive of Justice Breyer's approach is Professor Fallon's suggestion that balancing be viewed as a "metaphor for multifactor decisionmaking." *Id.* at 80.

the swirl of competing interests similar to those presented in *Pacifica*.¹²⁹ After considering these interests, Justice Breyer concluded:

The importance of the interest at stake here—protecting children from exposure to patently offensive depictions of sex; the accommodation of the interests of programmers in maintaining access channels and of cable operators in editing the contents of their channels; the similarity of the problem and its solution to those at issue in *Pacifica*; and the flexibility inherent in an approach that permits private cable operators to make editorial decisions, lead us to conclude that § 10(a) is a sufficiently tailored response to an extraordinarily important problem.¹³⁰

Furthermore, Justice Breyer found that the resolution of these competing interests by section 10(a) was both reasonable and flexible.¹³¹ The provision permitted censorship by cable operators but did not require it.¹³²

Nevertheless, Justice Thomas and Justice Kennedy raised some perplexing First Amendment questions. Can private property be characterized as a public forum?¹³³ Do public access channels constitute a public forum?¹³⁴ Can cable operators be considered common carriers when they allow leased access programming?¹³⁵ Should the claims of users of a medium always, as Justice Thomas insisted, be subordinated to the wishes of owners of communications media?¹³⁶

Instead of addressing any of these questions, Justice Breyer stated that they did not need to be answered¹³⁷ and opted to answer only the specific questions raised by section 10(a) under the guiding principle he identified at the beginning of his opinion.¹³⁸ Justice Breyer held that cable operators could bar indecent programming from leased access channels consistent with the First Amendment because such a holding dealt with

129. See *Denver Area*, 518 U.S. at 744.

130. *Id.* at 743 (citation omitted).

131. See *id.* at 746.

132. See *id.*

133. See *id.* at 791–94 (Kennedy, J., concurring in part and dissenting in part).

134. See *id.* at 791–92 (Kennedy, J., concurring in part and dissenting in part).

135. See *id.* at 794–96 (Kennedy, J., concurring in part and dissenting in part).

136. See *id.* at 816–17 (Thomas, J., concurring in the judgment in part and dissenting in part).

137. See *id.* at 743.

138. See *supra* notes 119–20 and accompanying text.

the serious problem of indecency "without imposing, in light of the relevant interests, an unnecessarily great restriction on speech."¹³⁹ I believe Justice Breyer upheld section 10(a) both because of its access features and because of its minimal censorship features.¹⁴⁰ Justice Breyer stressed, however, the access dimension of section 10(a) in his decision, making it a critical factor in his balancing analysis.¹⁴¹ Thus, the emphasis placed on access by the new balancing approach is a dominant feature that distinguishes it from the old balancing test.

*B. Justice Breyer: Skepticism, Context,
and First Amendment Doctrine*

As discussed above, Justice Breyer's survey of the path of First Amendment law emphasizes its flexibility and its adaptability.¹⁴² According to Justice Breyer, First Amendment commitment to protect speech from government regulation through "close judicial scrutiny" has been accomplished "without imposing judicial formulae so rigid that they become a straightjacket that disables Government from responding to serious problems."¹⁴³ These comments, however, seem a more accurate statement of the objective he seeks rather than a

139. *Denver Area*, 518 U.S. at 743.

140. *See id.* at 745-47. Justice Breyer says in this regard:

[T]he 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 1984.

Id. at 747.

141. *See id.* at 744-45. Justice Breyer specifically identifies the access for expression dimension of section 10(a):

The First Amendment interests involved are therefore complex, and involve a balance between those interests served by the access interests themselves (increasing the availability of avenues of expression to programmers who otherwise would not have them) and the disadvantage to the First Amendment interests of cable operators and other programmers (those to whom the cable operator would have assigned the channels devoted to access).

Id. at 743-44.

142. *See supra* notes 112-19 and accompanying text.

143. *Denver Area*, 518 U.S. at 741.

description of the current state of First Amendment law. In fact, the construction of the new balancing doctrine suggests that contemporary First Amendment law has become a doctrinal prison which often disables government from dealing with difficult and serious problems.¹⁴⁴ Indeed, the whole thrust of Justice Breyer's opinion in *Denver Area* represents a flight from the consequences of mechanical application of existing First Amendment doctrine.¹⁴⁵

Mechanical application of traditional First Amendment doctrine in the cable context would have resulted seemingly in a system of cable operators subjected to the same standard as broadcasters. In *Pacifica*, the Supreme Court upheld a sanction for broadcasting indecent programming during the mid-afternoon hours when the audience was largely comprised of children.¹⁴⁶ In the past, courts distinguished cable from broadcasting on the ground that broadcasting was more pervasive and easier for children to access, and the government was thereby justified in imposing greater regulations on broadcasting.¹⁴⁷

144. See *supra* text accompanying notes 126–32.

145. See *infra* text accompanying notes 154–59.

146. See *Pacifica*, 438 U.S. at 750.

147. See *Cruz v. Ferre*, 755 F.2d 1415, 1420–21 (11th Cir. 1985). In *Cruz*, the Eleventh Circuit considered the First Amendment validity of a Miami ordinance regulating the distribution of obscene and indecent material on cable television. See *id.* at 1416–17. The Eleventh Circuit rejected *Pacifica* as inapplicable. See *id.* at 1420 (“[W]e are persuaded that *Pacifica* cannot be extended to cover the particular facts of this case.”). The Court of Appeals found that cable was simply less intrusive and less pervasive than broadcasting. See *id.* at 1420–21.

In *Cruz*, the Eleventh Circuit explained the rationale for its distinction between broadcasting and cable:

The Court's concern with the pervasiveness of the broadcast media can best be seen in its description of broadcasted material as an “intruder” into the privacy of the home. Cablevision, however, does not “intrude” into the home. The Cablevision subscriber must affirmatively elect to have cable service come into his home. Additionally, the subscriber must make the additional affirmative decision whether to purchase any “extra” programming services, such as HBO. . . . The Supreme Court's reference to a “nuisance rationale” is not applicable to the Cablevision system, where there is no possibility that a non-cable subscriber will be confronted with materials carried only on cable. One of the keys to the very existence of cable television is the fact that cable programming is available only to those who have the cable attached to their television sets.

Id. at 1420 (quoting *Pacifica*, 438 U.S. at 748–50) (citations and footnote omitted).

Justice Breyer, on the other hand, seemed to accept cable as an intruder in the home.¹⁴⁸ He did not inquire into the pervasiveness of cable from the point of view of the cable subscriber, as the Eleventh Circuit did in *Cruz*. Instead, he directed his inquiry from the vantage point of a child whose parent subscribed to cable. From such a perspective, Justice Breyer found *Pacifica* directly applicable. Citing cable viewing studies, Justice Breyer concluded: "All [the *Pacifica*] factors are present here. Cable television broadcasting, including access channel broadcasting, is as 'accessible to children' as over-the-air broadcasting, if not more so. Cable television systems, including access channels, 'have established a uniquely pervasive presence in the lives of all Americans.'"¹⁴⁹ He noted that studies showed that "cable subscribers needed to sample more channels before settling on a program, thereby making them more, not less, susceptible to random exposure to unwanted materials."¹⁵⁰ In fact, Justice Breyer observed that section 10(a) was less restrictive than the sanction in *Pacifica* because it "likely restricts speech less than, not more than, the ban at issue in *Pacifica*."¹⁵¹

Did Justice Breyer use strict scrutiny in evaluating section 10(a)? On one level, his opinion incorporates the formalism of compliance with the restrictive strict scrutiny standard, but it is clear that Justice Breyer's approach is medium-specific, fact-specific, and nondoctrinal. For example, even though Justice Breyer "agreed" with Justice Kennedy that section 10(a) must be scrutinized "with the greatest care,"¹⁵² and that the interest of protecting children served by section 10(a) is compelling,¹⁵³ Breyer departed from Kennedy's strict scrutiny analysis in two respects. First, Breyer noted that "Justice Kennedy's focus on categorical analysis forces him to disregard the cable system operators' interests."¹⁵⁴ Thus, Justice Breyer advanced the notion that the free speech interests of the cable operator should be considered in cases where an access requirement was imposed on the operator. Yet this did not mean, as Justice Breyer described Justice Thomas' contention, that "*everything* turns

148. See *Denver Area*, 518 U.S. at 745 ("Patently offensive' material from [cable] stations can 'confron[t] the citizen' in the 'privacy of the home' with little or no prior warning." (quoting *Pacifica*, 438 U.S. at 748) (citations omitted)).

149. *Id.* at 744-45 (quoting *Pacifica*, 438 U.S. at 748) (citations omitted).

150. *Id.* at 745.

151. *Id.*

152. *Id.* at 787.

153. See *id.*

154. *Id.* at 745.

on the rights of the cable owner.”¹⁵⁵ Rather, to Justice Breyer, it meant that “the expressive interests of cable operators do play a legitimate role.”¹⁵⁶

Second, while Justice Kennedy thought the case required a very strict and narrow tailoring test by analogy to the public forum cases,¹⁵⁷ Justice Breyer opted not to invoke the public forum doctrine. Again, Justice Breyer found pragmatic considerations trumped doctrinal ones: “Rather than seeking an analogy to a category of cases, however, we have looked to the cases themselves.”¹⁵⁸ Using that criterion, he asserted that “*Pacifica* provides the closest analogy and lends considerable support to our conclusion.”¹⁵⁹

Justice Breyer’s approach to First Amendment problems is clearly skeptical, and his approach is contextual both in general and within a specific medium. Thus, a key difference between *Cruz* and *Denver Area* may well be their timing. *Cruz*, a 1985 decision, was decided eleven years before *Denver Area*, and the number of American households wired to cable dramatically increased in the years between the decisions.¹⁶⁰ The petitioners in *Denver Area* believed *Sable Communications of California, Inc. v. FCC*,¹⁶¹ a case in which the Supreme Court struck down a total ban on indecent phone calls (so called “dial-a-porn”),¹⁶² constituted precedent for striking down Section 10(a).¹⁶³ Yet Justice Breyer did not perceive *Sable* as relevant because he believed children were less likely to be exposed to indecent material over the telephone

155. *Id.*

156. *Id.*

157. *See id.* at 791–94 (Kennedy, J., concurring in part and dissenting in part).

158. *Id.* at 747.

159. *Id.* at 747–48.

160. *See* National Cable Television Ass’n, *Cable Television Developments: Basic Cable 1977–1997* (visited Sept. 4, 1998) <http://www.ncta.com/dir_basic.html> (on file with the *University of Michigan Journal of Law Reform*). Roughly forty million households, totaling 46.2% of television households, subscribed to basic cable in 1985. *See id.* Almost sixty-six million households, 67.3% of television households, were basic cable subscribers in 1997. *See id.* These numbers have remained stable through early 1998. *See* National Cable Television Ass’n, *Cable Television Developments: Current Estimates* (visited Sept. 4, 1998) <http://www.ncta.com/dir_current.html> (on file with the *University of Michigan Journal of Law Reform*).

161. 492 U.S. 115 (1989).

162. *See id.* at 131.

163. *See Denver Area*, 518 U.S. at 748.

than through cable.¹⁶⁴ Simply put, the telephone was less intrusive than cable.¹⁶⁵

Justice Breyer seemed to fly in the face of the new world of assured First Amendment protection for cable operators ushered in by *Turner I*. Justice Breyer's response to this contention was shrewdly crafted. He acknowledged the *Turner I* declaration that cable should be accorded greater First Amendment protection than broadcasting because the scarcity rationale justifying broadcast regulation did not apply to cable,¹⁶⁶ but he responded that despite the meaningful elements of this distinction for the "structural regulations at issue there (the must-carry rules)," it had "little to do with a case that involves the effects of television viewing on children."¹⁶⁷ Even if must-carry is viewed as content-neutral, however, *Turner I* seems arguably relevant to *Denver Area*, because it held content-based regulation of cable to a strict scrutiny standard.

Justice Breyer is not alone in his skepticism about the wisdom of applying contemporary First Amendment doctrine to new and difficult problems.¹⁶⁸ Despite the steady and luxuriant growth of First Amendment doctrine, its place is hardly secure in the hearts of the present members of the Court. For example, Justice Kennedy, while calling for adherence to established doctrine in *Denver Area*, struck out against contemporary standards of review in *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*.¹⁶⁹

164. *See id.* Justice Breyer noted:

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

Id.

165. *See id.*

166. *See id.* ("The Court's distinction in *Turner*, furthermore, between cable and broadcast television, relied on the inapplicability of the spectrum scarcity problem to cable.")

167. *Id.*

168. *See infra* text accompanying notes 169–72.

169. 502 U.S. 105, 124 (1991) (Kennedy, J., concurring) (questioning the appropriateness of the strict scrutiny standard and stating that strict scrutiny "has no real or legitimate place when the Court considers . . . whether the State may enact a burdensome restriction of speech based on content only").

The *Denver Area* petitioners argued that leased access channels on cable television were public forums.¹⁷⁰ Therefore, under existing First Amendment doctrine, content-based regulation of such fora violated the First Amendment unless such regulation was shown both to serve a compelling interest and narrowly drawn to achieve that interest.¹⁷¹ Justice Kennedy contended that leased access channels were common carriers and that a strict scrutiny standard of review should be applied to content-based regulation of leased access channels.¹⁷² Thus, under either of these kindred contentions, the Supreme Court could have struck down section 10(a) on First Amendment grounds.

Justice Breyer counseled against the easy application of a public forum or common carrier analysis to discrete and difficult cable television issues: “[W]e are wary of the notion that a partial analogy in one context, for which we have developed doctrines, can compel a full range of decisions in such a new and changing area.”¹⁷³ In addition, Justice Breyer was skeptical about whether existing First Amendment doctrine provided clear answers to the difficult problems raised by the 1992 Cable Act.¹⁷⁴ He differed from some of his colleagues in this respect.¹⁷⁵ In short, Justice Breyer’s skepticism encompassed both the application of old doctrine to new problems and the old doctrine itself. For example, is it clear that the leased access channel is a public forum?¹⁷⁶ Even if it is a limited public forum dedicated to one type of content alone, it is not clear

170. See *Denver Area*, 518 U.S. at 749.

171. See *id.* (noting that the petitioners argued that “the Government cannot ‘enforce a content-based exclusion’ from a public forum unless ‘necessary to serve a compelling state interest’ and ‘narrowly drawn’” (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983))).

172. See *id.* at 795–97 (Kennedy, J., concurring in part and dissenting in part).

173. *Id.* at 749.

174. See *id.* at 741–42 (“[N]o definitive choice among competing analogies (broadcast, common carrier, bookstore) allows us to declare a rigid single standard, good for now and for all future media and purposes.”).

175. See discussion *infra* Part III.C–D.

176. For a discussion of the public forum doctrine, see *supra* note 12. Justice Breyer rejects Justice Kennedy’s application of the public forum doctrine to public access channels because: 1) he questions whether the public forum doctrine “should be imported wholesale into the area of common carriage regulation”; 2) the Court has not yet addressed whether a limited public forum that the government dedicates to “one type of content or another is necessarily subject to the highest level of scrutiny”; and 3) the public forum doctrine does not resolve the conflict in “interests of programmers, viewers, cable operators, and children.” *Denver Area*, 518 U.S. at 749–50.

that such a forum must be evaluated under a strict scrutiny standard of review.¹⁷⁷

For Justice Breyer, the First Amendment validity of the Congressional decision to authorize cable operators to ban indecent programming on leased access channels must be considered in light of the "otherwise totally open nature of the forum that leased access channels provide for communication of other than patently offensive sexual material—taking account of the fact that the limitation was imposed in light of experience gained from maintaining a *totally* open 'forum.'"¹⁷⁸ In other words, upon weighing the speech-suppressive aspects of section 10(a) against its access dimension—a speech-creating dimension—the First Amendment is better served by upholding the provision than by invalidating it. Thus, the access dimension of section 10(a) is crucial, and it is more important than the use of a common carrier analysis, a public forum analysis, or a content-based analysis.¹⁷⁹

C. Section 10(b) of the 1992 Cable Act

Section 10(b) of the 1992 Cable Act presented a different set of interests for Justice Breyer to consider, but he maintained his commitment to analyzing the relevant interests and balancing them in favor of the interest in jeopardy.¹⁸⁰

Section 10(b) of the 1992 Cable Act required the cable operator to segregate and block "patently offensive" sexually oriented materials that appear on leased channels.¹⁸¹ No such obligation is imposed on cable operators vis-à-vis other channels on its system. Under section 10(b), subscribers were forced to request indecent programming in writing if they wanted it, indecent programming needed to be cablecast on a separate channel, and cable operators were forced to reblock

177. *See id.* at 750 ("Our cases have not yet determined, however, that government's decision to dedicate a public forum to one type of content or another is necessarily subject to the highest level of scrutiny.")

178. *Id.*

179. *See id.* ("If we consider this particular limitation of indecent television programming acceptable as a constraint on speech, we must no less accept the limitation it places on access to the claimed public forum or on use of a common carrier.")

180. *See infra* text accompanying notes 184–93.

181. *See* Cable Television Consumer Protection and Competition Act of 1992 § 10(b) (codified as amended at 47 U.S.C. § 532(j) (1994)); *see also* 47 C.F.R. § 76.701(c) (1995) (limiting access to subscribers who request it in writing).

the indecent programming if subscribers changed their minds regarding access.¹⁸² In sum, the provisions put special burdens on subscribers, leased access programmers, and cable operators.¹⁸³

In his plurality opinion, Justice Breyer held that section 10(b) violated the First Amendment.¹⁸⁴ In keeping with the rest of his *Denver Area* opinion, Justice Breyer declined to hold that strict scrutiny or the *Pacifica* standard applied categorically to the regulation of indecent programming on cable.¹⁸⁵

Note, however, that while Justice Breyer minimized the significance or usefulness of the existing formulations of First Amendment law in resolving the First Amendment challenges in *Denver Area*, section 10(b) fails whether examined under strict scrutiny, *Sable*, heightened scrutiny, *Turner I*, *O'Brien*, or *Central Hudson*. Breyer states: "The provision before us 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."¹⁸⁶

This statement both avoids and rewrites doctrine, as the "care and caution" formulation is really only a surface gloss on Justice Breyer's balancing analysis. The key question in this analysis is: When free speech interests are balanced against important or compelling governmental interests, does the particular governmental restraint under review reflect the

182. See 47 U.S.C. § 532(j). Section 532(j) provides:

[T]he Commission shall promulgate regulations designed to limit the access of children to indecent programming . . . by—(A) requiring cable operators to place on a single channel all indecent programs, as identified by program providers, intended for carriage on channels designated for commercial use under this section; (B) requiring cable operators to block such single channel unless the subscriber requests access to such channel in writing; and (C) requiring programmers to inform cable operators if the program would be indecent as defined by Commission regulations.

Id.

183. See *id.*

184. See *Denver Area*, 518 U.S. at 760 ("Consequently, we cannot find that the 'segregate and block' restrictions on speech are a narrowly, or reasonably, tailored effort to protect children.").

185. See *id.* at 755. This was despite the fact that Justice Breyer had relied on *Pacifica* to justify the validity of the regulation of leased access channels set forth in section 10(a): "Nor need we here determine whether, or the extent to which *Pacifica* does, or does not, impose some lesser standard of review where indecent speech is at issue." *Id.* (citations omitted).

186. *Id.* at 756.

necessary caution and care?¹⁸⁷ If the answer is yes, it is unnecessary to undertake the obscuring project of traveling through the requisite doctrinal steps.

Breyer concluded that the government simply failed to provide an adequate justification for section 10(b).¹⁸⁸ Note also that section 10(b) had no redeeming access dimension. Indeed, the government failed to answer fundamental questions about the restrictions on access imposed by section 10(b).¹⁸⁹ Specifically, why were the rigorous steps taken to protect children from patently offensive material on leased channels not applied to the unleased channels?¹⁹⁰ After all, a much greater number of children watch the unleased channels. In addition, why is blocking sufficient protection for children against regular sex-dedicated channels?¹⁹¹ And why must written access requests be added to blocking as a restriction when sex-dedicated channels are leased?¹⁹² There was no access for expression dimension to section 10(b) to balance against its speech suppressive aspects. Therefore, employing neither the strict scrutiny standard nor the less deferential standard used by Justice Stevens in *Pacifica*, Justice Breyer struck down section 10(b).¹⁹³

There are, of course, limitations to Justice Breyer's balancing analysis. *Denver Area* does not direct a specific standard of review for regulation of sexually oriented material on cable. Instead, Justice Breyer again concludes that the statute fails under any of our First Amendment doctrines: "[T]he 'segregate and block' restrictions on speech are [not] a narrowly, or reasonably, tailored effort to protect children. Rather, they are overly restrictive, 'sacrific[ing]' important First Amendment interests for too 'speculative a gain.'"¹⁹⁴

187. Whether Justice Breyer's "caution and care" formulation is more speech protective than the narrowly-tailored requirement of the strict scrutiny standard is unclear.

188. See *Denver Area*, 518 U.S. at 757 (questioning why the government failed to investigate alternative methods of blocking as opposed to imposing a complete ban).

189. See *id.* (noting that "[t]he record does not answer" why alternative methods enacted in the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, could not achieve the government's asserted interest, or why the regulations only applied to leased channels).

190. See *id.*

191. See *id.*

192. See *id.*

193. See *id.* at 757-58 (discussing the lack of a suitable justification for the government's imposition of segregate and block requirements on cable operators).

194. *Id.* at 760 (quoting *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 127 (1973)).

D. Section 10(c) of the 1992 Cable Act

Justice Breyer struck down section 10(c),¹⁹⁵ the last of the 1992 Cable Act provisions challenged on First Amendment grounds in *Denver Area*, despite its similarity to section 10(a).¹⁹⁶ Section 10(c) authorized cable operators to prevent the transmission of patently offensive programming on public access channels.¹⁹⁷ Section 10(c), like section 10(a), had a clear access dimension. It is through public access channels that local communities provide access for the views and ideas of the public on the cable systems they franchise.¹⁹⁸

Justice Breyer distinguished section 10(c) from section 10(a) on four grounds.¹⁹⁹ First, unlike leased access channels under section 10(a), section 10(c) regulated public access channels over which the cable operators had no editorial control.²⁰⁰ Leased access channels, on the other hand, were in the operator's control until leased.²⁰¹ As Justice Breyer put it: "Unlike [section] 10(a) therefore, [section] 10(c) does not restore to cable operators editorial rights that they once had, and the countervailing First Amendment interest is nonexistent, or at least much diminished."²⁰² In short, Justice Breyer perceived cable operators as having no First Amendment interests in public access channels.

195. Cable Television Consumer Protection and Competition Act of 1992 § 10(c), (codified as amended at 47 U.S.C. § 531 note (1994)), as amended by Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 136 (codified at 47 U.S.C.A. § 531(e) (West Supp. 1997)); see also 47 C.F.R. § 76.702 (1995) (allowing cable operators to restrict PEG channel access for obscene or indecent materials).

196. See *Denver Area*, 518 U.S. at 766.

197. Section 10(c) originally appeared as a note to 47 U.S.C. § 531 and was later amended and codified at 47 U.S.C.A. § 531(e) by the 1996 Telecommunications Act. The original note to section 531 instructed the FCC to promulgate such regulations as may be necessary to enable a cable operator of a cable system to prohibit the use, on such system, of any channel capacity of any public, educational, or governmental access facility for any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct. See 47 U.S.C. § 531 note. The amended version of this statutory requirement prohibits a cable operator from exercising any editorial control over PEG channels, "except a cable operator may refuse to transmit any public access program or portion of a public access program which contains obscenity, indecency, or nudity." 47 U.S.C.A. § 531(e).

198. See *Denver Area*, 518 U.S. at 760-61.

199. See *id.* at 761.

200. See *id.*

201. See *id.* ("Significantly, these are channels over which cable operators have not historically exercised editorial control.")

202. *Id.*

Second, public access channels were managed by structures blending public and private supervision.²⁰³ Whereas access channels were the domain of the lessee once leased, accountability was built into the management systems of public access channels.²⁰⁴ Thus, the local franchising authority could regulate public access channels to ensure that indecent programming is not aired.²⁰⁵

Third, by their very nature, public access channels were created to meet the programming needs of local communities.²⁰⁶ Protecting children against patently offensive programming may be a service objective of public access channel programming,²⁰⁷ but protection of public access drove Justice Breyer's conclusion here.

Fourth, the legislative history and record indicated that sexually explicit programming is found with greater ease on leased channels than on public access channels.²⁰⁸

In sum, an analysis of *Denver Area* from an access perspective reveals that section 10(a) was upheld to protect the governmental interest in access for expression, section 10(b) was struck down as a suppression of access with no countervailing governmental interest in limiting access, and section 10(c) was struck down because it clearly trespassed on the public access channels created by local government.²⁰⁹ Thus, under Justice Breyer's balancing analysis, a regulation will prevail when a governmental access for expression interest outweighs the governmental interest in suppression of expression. A regulation will fail, on the other hand, when no access interest is involved and the governmental interest is clearly suppression of speech alone.

203. *See id.*

204. *See id.* ("When a 'leased channel' is made available by the operator to a private lessee, the lessee has total control of programming during the leased time slot. Public access channels, on the other hand, are normally subject to complex supervisory systems of various sorts, often with both public and private elements." (citations omitted)).

205. *See id.* at 761-62.

206. *See id.* at 763.

207. *See id.* ("[T]he existence of a system aimed at encouraging and securing programming that the community considers valuable strongly suggests that a 'cable operator's veto' is less likely necessary to achieve the statute's basic objective, protecting children, than a similar veto in the context of leased channels.").

208. *See id.* at 763-64 ("Finally, our examination of the legislative history and the record before us is consistent with what common sense suggests, namely that the public/nonprofit programming control systems now in place would normally avoid, minimize, or eliminate any child-related problems concerning 'patently offensive' programming.").

209. *See discussion supra* Part II.A-D.

III. JUSTICE BREYER'S BALANCING ANALYSIS— ALLIES AND CRITICS

Fellow Justices and commentators have both criticized and praised Justice Breyer's refusal to identify a First Amendment standard for cable television.²¹⁰ Justice Souter, acknowledging the dynamism of the electronic media, joined Justice Breyer in avoiding the establishment of a precise First Amendment standard for all purposes and all media.²¹¹ Similarly, Justice Stevens expressed apprehension about classifying access channels into an existing category of First Amendment doctrine.²¹² By contrast, Justice Kennedy and Justice Thomas both criticized Justice Breyer's departure from conventional doctrine.²¹³ Despite his critics, Justice Breyer effectively creates a new doctrine based on a balancing of First Amendment interests in the context of the medium and the various entities affected.

210. One commentator has asserted that "the Supreme Court in *Denver Area* should have pronounced a First Amendment standard for cable television in order to finally remedy the inconsistencies among lower court analyses and decisions." Comment, Diana Israelashvili, *A Fear of Commitment: The Supreme Court's Refusal to Pronounce a First Amendment Standard for Cable Television in Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 71 ST. JOHN'S L. REV. 173, 181 (1997). Israelashvili complains: "As the Supreme Court awaits the 'proper' moment to enunciate a standard of review for cable regulation, lower courts are deciding First Amendment claims without guidance." *Id.* at 188. She further criticizes the *Denver Area* opinion as "losing sight of First Amendment principles and instead focusing on the mode of communication." *Id.* at 191. This comment, however, points out that some of the lower courts are using a "medium dependent analysis." *Id.* at 190.

In a similar vein, media lawyer James Goodale has written on *Denver Area*:

Breyer's opinion has received uniformly bad reviews including an editorial in the New York Times urging the Court to grant full First Amendment rights to cable TV, a position it has resisted for years. Apparently, the Court is petrified to take a false step in an era of technology—there is no other way to explain [*Denver Area*], which arguably represents the nadir of the Court's First Amendment jurisprudence.

James C. Goodale, *Outside Counsel: Caught in Breyer's Patch*, 216 N.Y. L.J. 1 (July 23, 1996). For Goodale, the clearly appropriate standard is strict scrutiny. *See id.*

The upside of a medium-dependent analysis, however, is that by focusing on the medium of communication, courts may better understand which First Amendment principles apply or indeed which principles best serve First Amendment objectives.

211. *See Denver Area*, 518 U.S. at 774–78 (Souter, J., concurring).

212. *See id.* at 768–74 (Stevens, J., concurring).

213. *See id.* at 780–81 (Kennedy, J., concurring in part and dissenting in part); *id.* at 812 (Thomas, J., concurring in the judgment in part and dissenting in part).

A. Justice Souter—Pragmatic Ally

Justice Breyer was not alone in his support for a balancing approach in *Denver Area*. In a thoughtful concurrence, Justice Souter found merit in Justice Kennedy's conviction that the various categories of speech protection work to assure "First Amendment security,"²¹⁴ but he countered the validity of this point by observing that some situations defy categorization.²¹⁵ For example, the broadcast in *Pacifica* was protected speech, yet the *Pacifica* Court supported a ban as to the particular hour of its broadcast.²¹⁶ Thus, neither the speech nor the limitation in *Denver Area* can be "categorized simply by content."²¹⁷

Justice Souter's analysis of the issues in *Denver Area* was as medium-specific and pragmatic as Justice Breyer's analysis. He conceded that a different standard applies to cable than to broadcasting²¹⁸ but that this is not invariably so. For example, Justice Souter agreed entirely with Justice Breyer that the easy access of children to indecency on broadcasting is equally true of cable.²¹⁹

Justice Souter offered further explanations for a return to balancing in the case of the new electronic media beyond the complexity of new technologies. Primary among these explanations was a concern about access for expression. Justice Souter expressed concern in *Denver Area* about "the ability of individual entities to act as bottlenecks to the free flow of information,"²²⁰ and, for Justice Souter, the future promises even farther reaching innovations in new electronic technologies.²²¹ In

214. *Id.* at 775 (Souter, J., concurring).

215. *See id.* (Souter, J., concurring) ("Neither the speech nor the limitation at issue here may be categorized simply by content.")

216. *See id.* (Souter, J., concurring) ("It is not so surprising that so contextually complex a category [as indecency in broadcasting as discussed in *Pacifica*] was not expressly assigned a standard level of scrutiny for reviewing the Government's limitation at issue there.")

217. *Id.* (Souter, J., concurring).

218. *See id.* at 775-76 (Souter, J., concurring).

219. *See id.* at 776 (Souter, J., concurring) ("[T]oday's plurality opinion rightly observes that the characteristics of broadcast radio that rendered indecency particularly threatening in *Pacifica*, that is, its intrusion into the house and accessibility to children, are also present in the case of cable television." (citation omitted)).

220. *Id.* (Souter, J., concurring).

221. *See id.* at 776-77 (Souter, J., concurring) ("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

a sense, therefore, Justice Souter was even less enthusiastic than Justice Breyer about the utility of categorical analysis in resolving the First Amendment issues raised by the new electronic media: “[A]s broadcast, cable, and the cybertechnology of the Internet and the World Wide Web approach the day of using a common receiver, we can hardly assume that standards for judging the regulation of one of them will not have immense, but now unknown and unknowable, effects on the others.”²²² Accordingly, in charting a course which permits regulation in light of the values in competition, we must accept the likelihood that the media of communication will become less categorical and more protean.

Justice Souter concluded that “a proper choice among existing doctrinal categories is not obvious.”²²³ Justice Souter therefore believed, like Justice Breyer, that if common sense indicated existing doctrinal choices were unsatisfactory in resolving the problems presented, the doctrine—and not common sense—should be scuttled.

B. The Skepticism of Justice Stevens

In classic First Amendment parlance, talk of censorship is meaningless when wielded by a private entity such as a cable operator. Censorship has First Amendment significance only insofar as it is wielded by government,²²⁴ as the First Amendment is addressed to government and not to the private sector.²²⁵ This is orthodox First Amendment law. Justice Stevens’ view, however, that government can create access rights in media and limit the extent of those access rights,²²⁶ is not orthodox First Amendment law.

As discussed previously, section 10(a) of the 1992 Cable Act authorizes cable operators to prohibit indecent programming

should be shy about saying the final word today about what will be accepted as reasonable tomorrow.”).

222. *Id.* (Souter, J., concurring) (footnote omitted).

223. *Id.* at 777 (Souter, J., concurring).

224. *See* U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”). The First Amendment applies to the States by means of the Fourteenth Amendment. *See Denver Area*, 518 U.S. at 737.

225. *See id.*

226. *See id.* at 770 (Stevens, J., concurring) (“A contrary conclusion would ill-serve First Amendment values by dissuading the Government from creating access rights altogether.” (footnote omitted)).

transmitted over leased access channels.²²⁷ Section 10(a), Justice Stevens concluded, does not constitute a restraint on free expression.²²⁸

Like Justices Breyer and Souter, Justice Stevens was skeptical regarding the usefulness of applying the existing categories and doctrines of First Amendment law "to the resolution of novel First Amendment questions arising in an industry as dynamic as [cable]."²²⁹ For example, the public forum doctrine and its rigid rules did not, in Justice Stevens' view, provide Congress with the necessary flexibility to develop governance rules for a new industry.²³⁰ In addition, structural rules designed to encourage or discourage specific programming off-limits for government also obstructed this flexibility.²³¹ By allowing cable operators to control indecent programming, section 10(a) only grants cable operators the same control over leased access channels as they have with their regular channels regarding such programming.²³²

Justice Stevens viewed section 10(c), however, as invalid under the First Amendment.²³³ Whereas leased access channels are creations of the federal government, public access channels are creations of local government.²³⁴ Section 10(c), which attempted to bar indecent speech, required the rejec-

227. See Cable Television Consumer Protection and Competition Act of 1992 § 10(a), (codified as amended at 47 U.S.C. § 532(h) (1994)); discussion *supra* Part II.A.

228. See *Denver Area*, 518 U.S. at 769 (Stevens, J., concurring) ("Section 10(a) is therefore best understood as a limitation on the amount of speech that the Federal Government has spared from the censorial control of the cable operator, rather than a direct prohibition against the communication of speech that, in the absence of federal intervention, would flow freely.")

229. *Id.* at 768 (Stevens, J., concurring).

230. See *id.* at 769 (Stevens, J., concurring). Justice Stevens opines that leased access channels are similar to the must-carry rules in that leased access channels are Congress' means for "facilitating certain speech that cable operators would not otherwise carry." *Id.* (Stevens, J., concurring). Justice Stevens' focus on access leads him to conclude:

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

Id. (Stevens, J., concurring).

231. See *id.* at 769-70 (Stevens, J., concurring).

232. See *id.* at 769-72 (Stevens, J., concurring).

233. See *id.* at 772-74 (Stevens, J., concurring).

234. See *id.* at 772-73 (Stevens, J., concurring).

tion of indecent programming on public access channels and the imposition of a federal censor into areas where such a censorship feature would otherwise not exist.²³⁵ Justice Stevens wanted to protect local public access cable channels from federal censorship. Thus, even though section 10(c) dealt with suppression of speech, Justice Stevens protected access for expression in his treatment of the provision.

Local franchising authorities might choose to create public access channels with no restrictions on programming, save indecent programming, or they might create such channels with no restrictions on programming at all. Yet such a decision, according to Justice Stevens, is a local, not federal, option: "The Federal Government has no more entitlement to restrict the power of a local authority to disseminate materials on channels of its own creation, then [sic] it has to restrict the power of cable operators to do so on channels that they own."²³⁶

Although Justice Stevens stated in *Denver Area* that strict scrutiny is appropriately applied to the regulation of even marginally protected speech, such as indecent speech,²³⁷ that justification is not what drives his conclusion that section 10(c) is invalid. Justice Stevens simply concluded that the harm that section 10(c) was ostensibly designed to address—protecting children from indecent speech—was not calibrated with sufficient precision to justify the restraint.²³⁸ In other words, the breadth of the restraint far exceeded the need for it.

In sum, Justice Stevens' concurring opinion in *Denver Area* does not expressly espouse balancing, but he uses balancing analysis, and he is indifferent to established First Amendment doctrine if it runs counter to the realities of the communications situation.

235. *See id.* at 773 (Stevens, J., concurring) ("It would inject federally authorized private censors into forums from which they might otherwise be excluded, and it would therefore limit local forums that might otherwise be open to all constitutionally protected speech.")

236. *Id.* (Stevens, J., concurring).

237. *See id.* (Stevens, J., concurring).

238. *See id.* at 774 (Stevens, J., concurring).

C. General First Amendment Standards
and Justice Kennedy

Justice Kennedy's opinion criticized the Breyer plurality as standardless and completely lacking in the discipline provided by doctrine.²³⁹ Justice Kennedy asserted that it is particularly crucial in cases involving emerging technology to govern First Amendment issues by constant principles.²⁴⁰ This should be so "even in novel settings."²⁴¹ Part of Justice Kennedy's opinion in *Denver Area* is a paean to the strict scrutiny standard in First Amendment cases.²⁴² He insisted that strict scrutiny was the appropriate standard with which to evaluate content-based legislation.²⁴³ This insistence seems somewhat surprising, as Justice Kennedy insisted on a per se standard for content-based legislation in his concurrence in *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*.²⁴⁴

239. See *id.* at 780–81 (Kennedy, J., concurring in part and dissenting in part) ("The [plurality] opinion treats concepts such as public forum, broadcaster, and common carrier as mere labels rather than as categories with settled legal significance; it applies no standard, and by this omission loses sight of existing First Amendment doctrine.").

Justice Kennedy's criticism, however, is ironic—he lists three examples of First Amendment doctrine that were created for specific situations, yet he criticizes the plurality's opinion for using a balancing approach which emphasizes the specific communications situation or context. See *id.* Justice Kennedy acknowledges that new First Amendment standards were needed for broadcasters, public fora, and common carriers. See *id.* at 784. Nonetheless, Justice Kennedy believes that the Court should not do the same for cable television. See *id.*

240. See *id.* at 781 (Kennedy, J., concurring in part and dissenting in part).

241. *Id.* (Kennedy, J., concurring in part and dissenting in part).

242. See *id.* at 784–87 (Kennedy, J., concurring in part and dissenting in part).

243. See *id.* at 784–85 (Kennedy, J., concurring in part and dissenting in part).

244. 502 U.S. 105, 124–25 (1991) (Kennedy, J., concurring) (addressing the constitutionality of a New York statute that required a criminal's revenue from publications about her crimes to be given to the Crime Board).

In *Simon & Schuster*, Justice Kennedy noted that the statute was content-based because it only applied to speech concerning a criminal's prior criminal acts. See *id.* at 124 (Kennedy, J., concurring). Justice Kennedy went on to criticize the application of strict scrutiny to content-based regulations on the ground that the standard was insufficiently speech protective:

Borrowing the compelling interest and narrow tailoring analysis [i.e., strict scrutiny] is ill advised when all that is at issue is a content-based restriction, for resort to the test might be read as a concession that States may censor speech whenever they believe there is a compelling justification for doing so.

Id. at 124–25 (Kennedy, J., concurring).

Justice Kennedy's justification for the strict scrutiny standard in *Denver Area*, however, was that the severity of the review required to disfavor government empowers individual citizens to shape the government.²⁴⁵ Relying on eloquent quotes from *Turner I*²⁴⁶ and *Cohen v. California*,²⁴⁷ Justice Kennedy stated that the First Amendment is based upon the idea that each person is allowed to decide for herself what "ideas and beliefs" to express.²⁴⁸ This approach can prove problematic, however, because the persons seeking to decide which ideas and beliefs to express are often competing entities and individuals, like the cable operators, over-the-air broadcasters, cable subscribers, and over-the-air broadcast viewers in *Turner I*. Although each of these competing participants has a First Amendment claim, their claims conflict, and strict scrutiny doctrine does little to provide a calculus to decide which of these competing claimants should be given precedence.

Justice Kennedy analyzed the two types of access channels regulated by section 10(a) and section 10(c) in terms of familiar First Amendment categories.²⁴⁹ Whereas public access

Justice Kennedy contended that a rule of per se invalidity for content-based regulations is more appropriate. "[*Simon & Schuster*] present[ed] the opportunity to adhere to a surer test for content-based cases and to avoid using an unnecessary formulation, one with the capacity to weaken central protections of the First Amendment." *Id.* at 128.

245. See *Denver Area*, 518 U.S. at 782–83 (Kennedy, J., concurring in part and dissenting in part).

246. 512 U.S. 622, 641 (1994).

247. 403 U.S. 15, 24 (1971).

248. *Denver Area*, 518 U.S. at 782–83 (Kennedy, J., concurring in part and dissenting in part). To justify his finding that "the most exacting scrutiny" applies in *Denver Area*, Justice Kennedy states:

In the realm of speech and expression, the First Amendment envisions the citizen shaping the government, not the reverse; it removes "governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity." [*Cohen*, 403 U.S. at 24]. "[E]ach person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal." [*Turner I*, 512 U.S. at 641].

Id. (Kennedy, J., concurring in part and dissenting in part).

249. See *id.* at 791–94 (Kennedy, J., concurring in part and dissenting in part) (summarizing regulation of PEG channels and concluding that "[p]ublic access channels meet the definition of a public forum"); *id.* at 794–97 (Kennedy, J., concurring in part and dissenting in part) (summarizing regulation of leased access channels and concluding that "[l]aws requiring cable operators to provide leased access are the practical equivalent of making them common carriers").

channels are public fora, leased access channels have common carrier obligations,²⁵⁰ and both regulation of public fora and regulations providing exceptions from common carrier obligations are subject to strict scrutiny.²⁵¹

Justice Kennedy conceded that it may be too early to choose a single standard to govern the electronic media for the future,²⁵² but that does not mean it is unnecessary, at this point, "to decide what standard applies to discrimination against indecent programming on cable access channels in the present state of the industry."²⁵³

Whereas Justice Breyer chose to use a balancing test in *Denver Area*, Justice Kennedy believed that strict scrutiny review should have been applied. Justice Kennedy defended strict scrutiny on the ground that strict scrutiny is itself a balancing test.²⁵⁴ "[S]trict scrutiny 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."²⁵⁵

The trouble with Justice Kennedy's defense of strict scrutiny review is that it can serve both as an indictment and an endorsement in certain circumstances. Justice Kennedy assumed that strict scrutiny would protect speech. While it might do so in the context of the regulations at issue in *Denver Area*, strict scrutiny cannot do so universally in cable-related speech problems.

Somewhat paradoxically, Justice Kennedy complained that Justice Breyer's balancing test used language very close to that of strict scrutiny.²⁵⁶ He perceived the resemblance as a

250. *See id.* (Kennedy, J., concurring in part and dissenting in part).

251. *See, e.g.,* *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) (applying strict scrutiny to regulations of speech content in a designated public forum); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 131 (1989) (applying strict scrutiny to the regulation of indecent content over a common carrier).

252. *See Denver Area*, 518 U.S. at 784-86 (Kennedy, J., concurring in part and dissenting in part).

253. *Id.* at 784 (Kennedy, J., concurring in part and dissenting in part).

254. *See id.* at 784-85 (Kennedy, J., concurring in part and dissenting in part).

255. *Id.* (Kennedy, J., concurring in part and dissenting in part).

256. *See id.* at 785-86 (Kennedy, J., concurring in part and dissenting in part). Justice Kennedy admonishes the plurality by declaring:

[It] cannot bring itself to apply strict scrutiny, yet realizes it cannot decide these cases without uttering some sort of standard; so it has settled for synonyms. "[C]lose judicial scrutiny" is substituted for strict scrutiny, and "extremely important problem" or "extraordinary proble[m]" is substituted for "compelling in-

great source of confusion because it would force courts and lawyers to waste time explaining the differences between strict scrutiny and Justice Breyer's standard.²⁵⁷

Yet strong differences exist between strict scrutiny and Justice Breyer's balancing of interests test. Unlike the usual case when strict scrutiny applies, the *Denver Area* plurality reached an "unprotective outcome."²⁵⁸ Identifying what qualifies as speech-protective is itself a complex and ambiguous matter. In *Turner I*, was it speech protective to affirm the validity of the must-carry legislation or to invalidate it? If the Court validates must-carry, the result infringes on the editorial rights of cable operators. If the Court invalidates must-carry, the result jeopardizes the voices of local over-the-air broadcasters and the access interests of their audience. Despite apparent conflicts, discussion of the strict scrutiny standard as speech protective assumes that speech rights are never in conflict.

Significantly, Justice Kennedy's opinion for the Court in *Turner I* avoided this conflict by concluding that the must-carry legislation is content-neutral rather than content-based.²⁵⁹ Yet the imprecision of the content-based versus content-neutral inquiry was demonstrated by the fact that five justices (Rehnquist, Stevens, Kennedy, Souter, and Blackmun) supported the notion that the must-carry rules were content-neutral,²⁶⁰ and the other four (O'Connor, Scalia, Thomas, and Ginsburg)

terest." The admonition that the restriction not be unnecessarily great in light of the interest it serves is substituted for the usual narrow tailoring requirements. All we know about the substitutes is that they are inferior to their antecedents. We are told the Act must be "appropriately tailored," "sufficiently tailored," or "carefully and appropriately addressed" to the problems at hand—anything, evidently, except narrowly tailored.

Id. at 786 (Kennedy, J., concurring in part and dissenting in part) (citations omitted).

257. *See id.* at 786–87 (Kennedy, J., concurring in part and dissenting in part). Justice Kennedy criticizes Justice Breyer's standard, stating:

These restatements have unfortunate consequences. The first is to make principles intended to protect speech easy to manipulate. The words end up being a legalistic cover for an ad hoc balancing of interests; in this respect the plurality succeeds after all in avoiding the use of a standard. Second, the plurality's exercise in pushing around synonyms for the words of our usual standards will sow confusion in the courts bound by our precedents. Those courts, and lawyers in the communications field, now will have to discern what difference there is between the formulation the plurality applies today and our usual strict scrutiny.

Id. (Kennedy, J., concurring in part and dissenting in part).

258. *Id.* at 787 (Kennedy, J., concurring in part and dissenting in part).

259. *See Turner I*, 512 U.S. at 643–44.

260. *See id.*

were convinced that the rules focused on local programming and were content-based.²⁶¹ Thus, the content-based versus content-neutral distinction is vulnerable to the charge Justice Kennedy made against Justice Breyer's ad hoc balancing in *Denver Area*. Namely, this slippery distinction serves as another example of "principles intended to protect speech"²⁶² which, in application, are subject to manipulation.

The dissenters in *Turner I*,²⁶³ as well as Justice Stevens in his *Turner I* concurrence,²⁶⁴ advanced a powerful argument that a major rationale of the must-carry legislation was to protect local service programming generated by local over-the-air broadcasters. In short, the only way to keep alive the content-neutral versus content-based distinction was to subject it to the same manipulation Justice Kennedy attributed to the balancing test used by Justice Breyer in *Denver Area*.

Justice Kennedy denied the government's contention in *Denver Area* that *Pacifica*²⁶⁵ applied a lower standard of review.²⁶⁶ Instead, Justice Kennedy stated that *Pacifica* applied a "context-specific analysis"²⁶⁷ to support its narrow holding. Justice Kennedy also stated, however, that "*Pacifica* teaches that access channels, even if analogous to ordinary public forums from the standpoint of the programmer, must also be considered from the standpoint of the viewer."²⁶⁸ Strict scrutiny was not used in *Pacifica*, and, not coincidentally, the Court considered and recognized other interests beyond those of the communicator in that case.²⁶⁹

261. See *id.* at 676-77, 685.

262. *Denver Area*, 518 U.S. at 786 (Kennedy, J., concurring in part and dissenting in part).

263. See *Turner I*, 512 U.S. at 675 (O'Connor, J., dissenting).

264. See *id.* at 669 (Stevens, J., concurring in part and concurring in the judgment) ("The public interests in protecting access to television for the millions of homes without cable and in assuring the availability of 'a multiplicity of information sources' are unquestionably substantial.").

265. 438 U.S. 726 (1978).

266. See *Denver Area*, 518 U.S. at 803 (Kennedy, J., concurring in part and dissenting in part) ("*Pacifica* did not purport, however, to apply a special standard for indecent broadcasting.").

267. *Id.* (Kennedy, J., concurring in part and dissenting in part).

268. *Id.* at 804 (Kennedy, J., concurring in part and dissenting in part).

269. Professor Charles Nesson and commentator David Marglin state that *Pacifica* and *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989), "suggest that the proper approach to a First Amendment challenge to restrictions on indecent content in a new medium is to apply strict scrutiny unless the medium is as pervasive and accessible to children as broadcasting." Charles Nesson & David Marglin, *The Day the Internet Met the First Amendment: Time and the Communications Decency Act*, 10 HARV. J.L. & TECH. 113, 117 (1996). Nesson and Marglin, however, recognize that the pervasiveness and accessibility characteristics are only part of an

Justice Kennedy was convinced that the Court should have evaluated the twin justifications for the holding in *Pacifica*—the unique pervasiveness of broadcasting and its accessibility to children²⁷⁰—under the strict scrutiny standard.²⁷¹ Justice Kennedy's opinion was an overall attack on the recognition of indecency as a lesser protected category of expression. Citing *R.A.V. v. City of St. Paul*, he pointed out that “we have been reluctant to mark off new categories of speech for diminished constitutional protection.”²⁷² Yet it seems too late to make such an argument, as both *Pacifica* and *Sable* recognized indecency as a lesser protected category of speech.²⁷³

In *Denver Area*, Justice Kennedy perceived “no compelling interest in restoring a cable operator's First Amendment right of editorial discretion.”²⁷⁴ Consequently, he advocated striking down section 10(a).²⁷⁵ Further, he asserted, carrying indecent speech over leased access channels should not be considered “forced speech” of the cable operator.²⁷⁶ Although Congress did have a compelling interest in protecting children from indecent speech, Justice Kennedy believed that neither section 10(a) nor section 10(c) was narrowly tailored.²⁷⁷

In addition, insofar as cable operators succeed in prohibiting indecent speech on access channels, both adults and children are deprived of such programming. Kennedy's conclusion was clear:

indecency analysis. See generally *id.* They argue that the Court is aware of how fast technology is changing and that the law must evolve with it. See *id.* at 134. “This awareness suggests that the Supreme Court will not necessarily rely on time-bound lower court findings that the Internet should be subject to standards developed for telephony and not for broadcast, or that it is technologically impossible to make indecent content identifiable to Internet browsers.” *Id.*

270. See *Pacifica*, 438 U.S. at 748 (noting that indecent broadcasting “confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of intruder”); *id.* at 749 (noting that “broadcasting is uniquely accessible to children, even those too young to read”).

271. See *Denver Area*, 518 U.S. at 804 (Kennedy, J., concurring in part and dissenting in part).

272. *Id.* (Kennedy, J., concurring in part and dissenting in part) (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–90 (1992)).

273. See *Pacifica*, 438 U.S. at 749–50; *Sable*, 492 U.S. at 126.

274. *Denver Area*, 518 U.S. at 805 (Kennedy, J., concurring in part and dissenting in part).

275. See *id.* (Kennedy, J., concurring in part and dissenting in part).

276. See *id.* at 805–06 (Kennedy, J., concurring in part and dissenting in part).

277. See *id.* at 806 (Kennedy, J., concurring in part and dissenting in part) (“Congress does have, however, a compelling interest in protecting children from indecent speech Sections 10(a) and (c) nonetheless are not narrowly tailored to protect children from indecent programs on access channels.”).

Sections 10(a) and (c) present a classic case of discrimination against speech based on its content. There are legitimate reasons why the Government might wish to regulate or even restrict the speech at issue here, but Sections 10(a) and (c) are not drawn to address those reasons with the precision the First Amendment requires.²⁷⁸

In the *ACT* cases, which the Supreme Court steadfastly declined to review,²⁷⁹ one side repeatedly argued that the indecency standard enforced by the FCC was impermissibly vague under the First Amendment and failed to meet the strict scrutiny standard. Both arguments were continually rejected by the D.C. Circuit.²⁸⁰ Interestingly, Justice Ginsburg joined Justice Kennedy in his opinion in *Denver Area*, although she accepted the FCC's amorphous definition of indecency and held that it was not vague in *ACT III*.²⁸¹ Further, she was willing to rule that the FCC's safe harbor constructs could satisfy a compelling state interest standard.²⁸²

One of the difficulties *Denver Area* presents is that the examination proceeds from different focal points by various Justices. Justice Breyer and Justice Souter analyzed the issue by determining which standard is appropriate to govern a new medium like cable.²⁸³ Justice Kennedy, on the other hand, looked beyond the medium. His question related to which standard of review is appropriate for the regulation of indecent speech.²⁸⁴ Kennedy's corollary to this question focused on the *Pacifica* standard as a narrow holding bred in broadcasting which should not be extended to newer electronic media.²⁸⁵

278. *Id.* at 807 (Kennedy, J., concurring in part and dissenting in part).

279. *See* *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) (invalidating FCC regulations that banned public television broadcasters from airing indecent programming) (*ACT I*), *overruled in part* by *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995), *cert. denied sub nom. Pacifica Found. v. FCC*, 116 S. Ct. 701 (1996); *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991) (invalidating a Congressional ban on all indecent programming by public television broadcasters) (*ACT II*), *cert. denied sub nom. Children's Legal Found. v. Action for Children's Television*, 503 U.S. 913 (1992); *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995) (upholding the banning of indecent programs between 6:00 a.m. and 10:00 p.m.) (*ACT III*), *cert. denied sub nom. Pacifica*, 116 S. Ct. 701 (1996).

280. *See ACT I*, 852 F.2d at 1338-40; *ACT II*, 932 F.2d at 1509; *ACT III*, 58 F.3d at 659.

281. *See ACT III*, 58 F.3d at 659.

282. *See id.* at 669.

283. *See Denver Area*, 518 U.S. at 740; *id.* at 775-76 (Souter, J., concurring).

284. *See id.* at 784-87 (Kennedy, J., concurring in part and dissenting in part).

285. *See id.* at 803-04 (Kennedy, J., concurring in part and dissenting in part).

Justice Breyer's balancing approach serves as a tentative standard for the beginning of a new electronic media age. The balancing is candid, contextual, and media deferential, and it yielded, rather than thwarted, protective results in *Denver Area*.

D. The First Amendment Monism of Justice Thomas

Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, made a rather startling observation: "The text of the First Amendment makes no distinction between print, broadcast, and cable media, but we have done so."²⁸⁶ The Justices did not address exactly how the Framers of the Constitution could have made such a distinction in 1791, but the statement is an appropriate introduction to the First Amendment as Justice Thomas' opinion describes it. It is a world of absolutes, and it is far removed from the world of caution and contingency inhabited by Justice Breyer and Justice Souter.

Justice Thomas surveyed the Supreme Court's struggle to identify an appropriate First Amendment standard for cable.²⁸⁷ Concluding with *Turner I*, he asserted that *Turner I* analogized the First Amendment status of cable to that accorded the print media.²⁸⁸ This is a bold claim. Indeed, Justice Thomas' very statement suggests its vulnerability: "While Members of the Court [in *Turner I*] disagreed about whether the must-carry rules imposed by Congress were content-based, and therefore subject to strict scrutiny, there was agreement that cable operators are generally entitled to much the same First Amendment protection as the print media."²⁸⁹

If *Turner I* had truly analogized cable to the print media, the Court would have declared the must-carry regulations invalid. Instead, the Court held the must-carry regulations content-neutral and valid²⁹⁰ as measured by the *O'Brien* intermediate

286. *Id.* at 812 (Thomas, J., concurring in the judgment in part and dissenting in part).

287. *See id.* at 812-15 (Thomas, J., concurring in the judgment in part and dissenting in part).

288. *See id.* at 815 (Thomas, J., concurring in the judgment in part and dissenting in part).

289. *Id.* (Thomas, J., concurring in the judgment in part and dissenting in part).

290. *See Turner I*, 512 U.S. at 661.

standard of review.²⁹¹ Thus, the manipulable nature of the content-based/content-neutral distinction renders questionable Justice Thomas' assertion that, in *Turner I*, the Court adopted "much of the print [First Amendment] paradigm."²⁹² Motivated by an equal dose of wishful thinking, particularly in light of *Turner II*, was Justice Thomas' companion assertion that, by denying application of the *Red Lion*²⁹³ standard to cable, the *Turner I* Court made some lasting judgments about "the respective First Amendment rights of competing speakers."²⁹⁴

For Justice Thomas, the bifurcated character of First Amendment protection reflected in the *Red Lion* and *Tornillo*²⁹⁵ standards were simply wrong.²⁹⁶ Although he did not assert that the print media standard should govern all the newly emergent electronic media, Justice Thomas was at least clear that the *Red Lion* standard should be confined to broadcasting:

Our First Amendment distinctions between media, dubious from their infancy, placed cable in a doctrinal wasteland in which regulators and cable operators alike could not be sure whether cable was entitled to the substantial First Amendment protections afforded the print

291. *United States v. O'Brien*, 391 U.S. 367 (1968). For a discussion of *O'Brien*, see *supra* note 46.

292. *Denver Area*, 518 U.S. at 816 (Thomas, J., concurring in the judgment in part and dissenting in part). Although in *Turner I* the Court found the must-carry rules to be content-neutral, see *Turner I*, 512 U.S. at 661, it also acknowledged that content-based regulation of cable should be evaluated under a strict scrutiny standard. See *id.* at 642. Therefore, Justice Thomas concluded that the standard of review for content regulation of cable and content regulation of the print media is now the same, i.e., strict scrutiny. See *Denver Area*, 518 U.S. at 821 (Thomas, J., concurring in the judgment in part and dissenting in part). *Turner I*, however, demonstrated that the Court will sometimes view cable regulations as content-neutral. See *supra* text accompanying notes 259-62. In other words, the content-based versus content-neutral divide in cable regulation is quite unclear and manipulable. Thus, the attempt to equate the content regulation of cable to the content regulation of the print media is doubtful even under the Thomas analysis.

293. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 396-401 (1969) (relying on the scarcity rationale).

294. *Denver Area*, 518 U.S. at 816 (Thomas, J., concurring in the judgment in part and dissenting in part).

295. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 257 (1974) (finding that a "government-enforced right of access" for print media reduces public debate).

296. See *Denver Area*, 518 U.S. at 812-13 (Thomas, J., concurring in the judgment in part and dissenting in part).

media or was subject to the more onerous obligations shouldered by the broadcast media.²⁹⁷

Justice Thomas challenged the idea of a pluralistic First Amendment. In Justice Thomas' view, the sin of *Red Lion* was that the Court "legitimized consideration of the public interest and emphasized the rights of viewers."²⁹⁸ He stated that such a view has been routed from cable after *Turner I*: "It is the operator's right that is preeminent."²⁹⁹ Indeed, Justice Thomas concluded: "[W]hen there is a conflict, a programmer's asserted right to transmit over an operator's cable system must give way to the operator's editorial discretion."³⁰⁰

Justice Breyer's new balancing approach, as discussed above,³⁰¹ provided specific consideration to the access for expression dimension of the cable regulations under review in *Denver Area*.³⁰² Access rights must be weighed against the free speech rights of the cable operator. For Justice Thomas, no First Amendment rights conflicted in *Denver Area* because the only rights asserted that merit First Amendment status were those of the cable operator.³⁰³ In *Denver Area*, Thomas noted that the rationale behind the plurality was not "intuitively obvious" as to why programmers and viewers have any First Amendment rights.³⁰⁴ In reality, however, it is not intuitively obvious that cable operators enjoy the whole panoply of First Amendment rights either.

The balancing used by Justice Breyer, Justice Thomas stated, defied the effort in *Turner I* to achieve a First Amendment standard for cable.³⁰⁵ Moreover, this "heretofore unknown

297. *Id.* at 813-14 (Thomas, J., concurring in the judgment in part and dissenting in part) (footnote omitted).

298. *Id.* at 816 (Thomas, J., concurring in the judgment in part and dissenting in part).

299. *Id.* (Thomas, J., concurring in the judgment in part and dissenting in part).

300. *Id.* (Thomas, J., concurring in the judgment in part and dissenting in part).

301. See discussion *supra* Part II.

302. See *supra* text accompanying notes 137-41, 178-79, 188-93.

303. See *Denver Area*, 518 U.S. at 824 (Thomas, J., concurring in the judgment in part and dissenting in part) ("The First Amendment challenge, if one is to be made, must come from the party whose constitutionally protected freedom of speech has been burdened. Viewing the federal access requirements as a whole, it is the cable operator, not the access programmer, whose speech rights have been infringed." (footnote omitted)).

304. See *id.* at 817 (Thomas, J., concurring in the judgment in part and dissenting in part).

305. See *id.* at 817-18 (Thomas, J., concurring in the judgment in part and dissenting in part) ("Justice Breyer's detailed explanation of why he believes it is 'unwise and unnecessary' to choose a standard against which to measure petitioners' First

standard is facially subjective and openly invites balancing of asserted speech interests to a degree not ordinarily permitted.³⁰⁶ Justice Thomas added that although his approach might be rigid, it was "required by our precedents" and not of his making.³⁰⁷ The Court's precedents do not, however, recognize only the rights of the communications entity holder. Even *Tornillo* did not hold this; it did not hold that the reader of a newspaper or the person attacked has no rights of free speech protected by the First Amendment.³⁰⁸ *Tornillo* held that the Court could not protect First Amendment rights without government intrusion acting as a censor and without jeopardizing the editorial autonomy *Tornillo* found to be a preeminent value.³⁰⁹

Justice Thomas insisted that the interests of the parties in *Denver Area* were not interests protected by the First Amendment.³¹⁰ To the extent that Breyer's balancing of asserted speech interests recognized such rights,³¹¹ Thomas concluded that it is mistaken doctrine.³¹² Thomas devoted the majority of his opinion to the task of showing that no speech interests, other than that of the cable operator, were protected.³¹³ His project was clear. He denied the validity of any First Amendment

Amendment claims largely disregards our recent attempt in *Turner* to define that standard." (footnote omitted).

306. *Id.* at 818 (Thomas, J., concurring in the judgment in part and dissenting in part).

307. *Id.* (Thomas, J., concurring in the judgment in part and dissenting in part).

308. *See generally* *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974).

309. *See generally id.* at 254-58.

310. *See Denver Area*, 518 U.S. at 818-19 (Thomas, J., concurring in the judgment in part and dissenting in part).

311. *See id.* at 818 (Thomas, J., concurring in the judgment in part and dissenting in part). Justice Thomas declares:

In any event, even if the plurality's balancing test were an appropriate standard, it could only be applied to protect speech interests that, under the circumstances, are themselves protected by the First Amendment. But, by shifting the focus to the balancing of "complex" interests, Justice Breyer never explains whether (and if so, how) a programmer's ordinarily unprotected interest in affirmative transmission of its programming acquires constitutional significance on leased and public access channels.

Id. (Thomas, J., concurring in the judgment in part and dissenting in part) (citations omitted).

312. *See id.* (Thomas, J., concurring in the judgment in part and dissenting in part).

313. *See generally id.* (Thomas, J., concurring in the judgment in part and dissenting in part).

theory that is instrumental in its objectives and pluralistic in its coverage or scope.³¹⁴

In the *Denver Area* case, cable programmers challenged sections 10(a) and (c) as improper infringements on their free speech rights.³¹⁵ For Justice Thomas, however, the real question was whether the leased and public access obligations imposed by statute on cable operators improperly restricted the free speech rights of those cable operators.³¹⁶

Justice Thomas concluded by asserting that leased access and public access requirements violated *Tornillo*:

It is one thing to compel an operator to carry leased and public access speech, in apparent violation of *Tornillo*, but it is another thing altogether to say that the First Amendment forbids Congress to give back part of the operators' editorial discretion, which all recognize as fundamentally protected, in favor of a broader access right.³¹⁷

To say that mandatory public access and leased access channels violate *Tornillo* would be an extravagant statement. If the rights of the communications entity's owners were intended to trump all other claims to First Amendment protection for all media, *Tornillo* would have been the ideal occasion to make that statement. The *Tornillo* Court instead directed itself to the print media alone and did not so much as cite *Red Lion*, the most obvious contrary electronic media precedent then extant.

Justice Thomas exerted great effort to undermine, on First Amendment grounds, the constitutionality of legislation imposing leased or public access channel requirements on cable operators.³¹⁸ In his view, the First Amendment status of leased access channels is not improved even if one views leased access channels as common carriers: "Whether viewed as the creation of a common carrier scheme or simply as a regulatory

314. See generally *id.* (Thomas, J., concurring in the judgment in part and dissenting in part).

315. See *id.* at 738-39, 760-61.

316. See *id.* at 822 (Thomas, J., concurring in the judgment in part and dissenting in part) ("In my view, the constitutional presumption properly runs in favor of the operators' editorial discretion, and that discretion may not be burdened without a compelling reason for doing so.")

317. *Id.* (Thomas, J., concurring in the judgment in part and dissenting in part).

318. See *id.* at 820-24 (Thomas, J., concurring in the judgment in part and dissenting in part).

restriction on cable operators' editorial discretion, the net effect is the same: operators' speech rights are restricted to make room for access programmers."³¹⁹

At first glance, it seems as though Justice Thomas might have encountered more difficulty asserting the First Amendment invalidity of public access channels. As the plurality and Justice Kennedy explained, the theory was that a franchisee receives approval to construct a cable system on the condition that he dedicate some channels to public, educational, and governmental purposes.³²⁰ Thus, with respect to public access channels, the cable operator had no First Amendment claim because he never controlled those channels in the first place. On this point, Justice Thomas blended the argument that cable operators own their franchises with the inapplicability of the public forum doctrine:

Cable systems are not public property. Cable systems are privately owned and privately managed, and petitioners point to no case in which we have held that government may designate private property as a public forum. The public forum doctrine is a rule governing claims of "a right of access to public property," and has never been thought to extend beyond property generally understood to belong to the government.³²¹

The final part of Justice Thomas' opinion challenged the First Amendment validity of public access channels:

In no other public forum that we have recognized does a private entity, owner or not, have the obligation not only to permit another to speak, but to actually help produce and then transmit the message on that person's behalf. . . . [P]ublic access requirements, in my view, are a regulatory restriction on the exercise of cable operators' editorial discretion, not a transfer of a sufficient property

319. *Id.* at 825 (Thomas, J., concurring in the judgment in part and dissenting in part).

320. *See id.* at 760-61; *id.* at 787-90 (Kennedy, J., concurring in part and dissenting in part).

321. *Id.* at 827 (Thomas, J., concurring in the judgment in part and dissenting in part) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983)) (footnote omitted).

interest in the channels to support a designation of that channel as a public forum.³²²

In summary, Justice Breyer and Justice Thomas' opinions are polar opposites. Under Justice Breyer's perspective, existing First Amendment doctrine was insufficiently pluralistic and inadequately sensitive to the unique issues raised by newly emerging electronic media.³²³ Justice Thomas, on the other hand, asserted that First Amendment law in the United States is too pluralistic, too sensitive to specific media, and insufficiently respectful of First Amendment principles.³²⁴

IV. A NEW COMMUNICATIONS TECHNOLOGY CASE STUDY—THE INTERNET CASE: *RENO V. ACLU*

Justice Breyer's balancing approach recognized that First Amendment standards need to account for the context of the medium.³²⁵ Even prior to the *Denver Area* decision, courts were required to address government regulation of indecency on a new, and very unique, medium—the Internet.³²⁶ *ACLU v. Reno* and *Shea ex rel. American Reproductions v. Reno*³²⁷ were challenges to Congressional regulation of indecency on the Internet. These cases served as the basis for the United States Supreme Court's review of a First Amendment challenge to Title V of the Telecommunications Act of 1996, also known as the Communications Decency Act (CDA),³²⁸ in *Reno v. ACLU*.³²⁹ The CDA prohibited the knowing transmission of obscene or indecent messages on the Internet to anyone under eighteen years of age.³³⁰ In addition, the CDA prohibited

322. *Id.* at 829–31 (Thomas, J., concurring in the judgment in part and dissenting in part).

323. *See supra* text accompanying notes 97, 103–16.

324. *See supra* text accompanying notes 101, 298–300, 303–04.

325. *See supra* text accompanying notes 97, 103–16.

326. *See ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996), *aff'd*, 117 S. Ct. 2329 (1997).

327. 930 F. Supp. 916 (S.D.N.Y. 1996), *aff'd*, 117 S. Ct. 2329 (1997).

328. Pub. L. No. 104–104, § 502, 110 Stat. 56, 133 (codified at 47 U.S.C.A. § 223(a)–(e)); *see Reno*, 117 S. Ct. at 2337–39.

329. 117 S. Ct. 2329, 2334 (1997).

330. *See* 47 U.S.C.A. § 223(a). Section 223(a) provides in pertinent part:

knowingly sending or displaying patently offensive messages in a manner which made the messages available to anyone under eighteen years of age.³³¹ A three-judge district court

Whoever—(1) in interstate or foreign communications . . . (B) by means of a telecommunications device knowingly—(i) makes, creates, or solicits, and (ii) initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication; . . . (2) knowingly permits any telecommunications facility under his control to be used for any activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under Title 18, or imprisoned not more than two years, or both.

Id.

331. *See id.* § 223(d). Section 223(d) provides:

Whoever—(1) in interstate or foreign communications knowingly—(A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or (B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or (2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under Title 18, or imprisoned not more than two years, or both.

Id.

Congress included in section 223 two affirmative defenses to subsections (a) and (d). *See id.* § 223(e)(5). Section 223(e)(5) provides:

It is a defense to a prosecution under subsection (a)(1)(B) or (d) of this section, or under subsection (a)(2) of this section with respect to the use of a facility for an activity under subsection (a)(1)(B) of this section that a person—(A) has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to a communication specified in such subsections, which may involve any appropriate measures to restrict minors from such communications, including any method which is feasible under available technology; or (B) has restricted access to such communication by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number.

Id.

panel struck down these provisions,³³² and the Supreme Court resoundingly affirmed.³³³

Justice Breyer did not write an opinion in *Reno*. Instead, he joined Justice Stevens' opinion for the Court. Justice Stevens' opinion in *Reno* was a fact-specific and media-specific decision.³³⁴ Is it compatible with Justice Breyer's opinions in *Turner II* and *Denver Area*? Justice Stevens' opinion in *Reno* is extremely attentive to the nature and character of the Internet as a new electronic medium,³³⁵ and the media context is as central in his analysis as it was in Justice Breyer's opinions. The nature of a new communications technology, cable television, was used to excuse a departure from First Amendment doctrine in *Denver Area*,³³⁶ while in *Reno*, the nature of a new communications technology was used to justify the application of existing First Amendment doctrine.³³⁷ Note, however, that the Court's use of existing First Amendment doctrine—strict scrutiny—is not as significant as it may appear at first blush.³³⁸

In *Reno*, Justice Stevens took considerable pains to distinguish the unique character of the broadcast media, and its

332. See *ACLU v. Reno*, 929 F. Supp. 824, 849 (E.D. Pa. 1996). This suit, challenging the constitutionality of sections 223(a)(1) and 223(d), was filed against Attorney General Janet Reno by "various organizations and individuals who . . . are associated with the computer and/or communications industries, or who publish or post materials on the Internet, or belong to various citizen groups." *Id.* at 827. The suit alleged that the CDA infringed on the plaintiffs' First Amendment rights to publish indecent material, in addition to chilling the publication of decent material. See *id.*

Each judge on the panel filed an opinion based on a different theory of why the CDA was unconstitutional. See *id.* at 849–57 (Sloviter, C.J.) (holding that the CDA is not narrowly tailored and "that the CDA reaches speech subject to the full protection of the First Amendment, at least for adults"); *id.* at 857–65 (Buckwalter, J.) (holding that the CDA was vague and did not adequately define the type of conduct subject to criminal sanction); *id.* at 865–83 (Dalzell, J.) (focusing on the nature of the Internet and concluding that regulation of speech on the Internet should be scrutinized under the strictest standard).

333. See *Reno*, 117 S. Ct. at 2351.

334. See *id.* at 2342–43 (rejecting analogizing the Internet to broadcasting and recognizing that "[e]ach medium of expression . . . may present its own problems" (quoting *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975))).

335. See *id.* at 2334–36, 2343–44. Justice Stevens goes to considerable lengths to distinguish the Internet from other media. See *id.* at 2343–44 (distinguishing the Internet from broadcasting because it is not subject to the same scarcity restrictions). In discussing the nature of the Internet, Justice Stevens concludes that "[the Internet] constitute[s] a unique medium—known to its users as 'cyberspace'—located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet." *Id.* at 2334–35.

336. See discussion *supra* Part I.A.

337. See *infra* text accompanying notes 363–65.

338. See *infra* text accompanying note 372.

susceptibility to regulation, from other media.³³⁹ Justice Stevens distinguished television and radio from the Internet at the outset: "Unlike communications received by radio and television, 'the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial. A child requires some sophistication and some ability to retrieve material and thereby use the Internet unattended.'"³⁴⁰ Justice Stevens relied on his statement, made nearly twenty years ago in *Pacifica*, "that 'of all forms of communication' broadcasting had received the most limited First Amendment protection."³⁴¹ The rationale for according broadcasting more limited protection than other media was that warnings cannot shield the listener "from unexpected program content."³⁴²

Justice Stevens took equally great care in *Reno* to describe the technology of the Internet. Unlike broadcasting, the Internet had no comparable regulatory history, and its technological character was not similar to other media.³⁴³ The likelihood of surprise by unwanted content on the Internet was remote due to the "series of affirmative steps" necessary to access such material.³⁴⁴

In *Denver Area*, Justice Breyer concluded that the possibility of a child being surprised by indecent material was equally great on cable and broadcasting.³⁴⁵ Yet *Reno* mentioned neither Justice Breyer's analysis of the pervasiveness of cable television nor the holding of pre-*Denver Area* courts that the affirmative steps necessary to be a cable subscriber justified distinguishing cable from broadcasting and for avoiding the reach of the *Pacifica* decision.³⁴⁶ Instead, the idea which

339. See *id.* at 2341-44 ("Neither before nor after the enactment of the CDA have the vast democratic fora of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry.").

340. *Id.* at 2336 (quoting *ACLU*, 929 F. Supp. at 845).

341. *Id.* at 2342 (quoting *Pacifica*, 438 U.S. at 748-49).

342. *Id.*

343. See *id.* (noting that in *Pacifica*, "the Commission's order applied to a medium [broadcasting] which as a matter of history had 'received the most limited First Amendment protection,'" (quoting *Pacifica*, 438 U.S. at 748), but that the Internet "has no comparable history").

344. See *id.*

345. See *Denver Area*, 518 U.S. at 744 ("Cable television broadcasting, including access channel broadcasting, is as 'accessible to children' as over-the-air broadcasting, if not more so.").

346. Cf. *Cruz v. Ferre*, 755 F.2d 1415, 1420-21 (11th Cir. 1985) (holding that *Pacifica* was inapplicable in the cable context because a cable subscriber must take affirmative actions to subscribe and select the programming to be viewed).

pervades *Reno* was that broadcasting alone is uniquely intrusive and uniquely pervasive.³⁴⁷ “Those factors are not present in cyberspace.”³⁴⁸ Yet if Internet use is pervasive among any sector of the population, it seems intuitively to be pervasive among the young.

A. Justice Stevens: Preserving Access

The technology of the Internet, Justice Stevens concluded, infuses it with a democratic character.³⁴⁹ In this regard, he relied on the opinion of Judge Dalzell in the lower court. In particular, Judge Dalzell focused on the question of what constitutes an appropriate First Amendment standard of review for the Internet.³⁵⁰ Without specifically endorsing Judge Dalzell’s analysis, Justice Stevens was clearly intrigued by it. Judge Dalzell’s theory suggested that the greater the ability of an electronic medium to provide public access, the greater its claim to First Amendment protection.³⁵¹

347. *See Reno*, 117 S. Ct. at 2342–43.

348. *Id.* at 2343.

349. *See id.* at 2344. Justice Stevens declares:

Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. As the District Court found, “the content on the Internet is as diverse as human thought.”

Id. (quoting *ACLU*, 929 F. Supp. at 842).

350. *See ACLU*, 929 F. Supp. at 872–83.

351. *See id.* at 880–81. Judge Dalzell traces the efforts of critics who argue that the marketplace of ideas fails because the market is controlled by the people who own the media. *See id.* at 879–80. He notes that the Supreme Court, although having recognized that access to the media is unequal, *see Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 248–50 (1974), has refrained from allowing government to regulate the media in a manner that would correct the market failure—i.e., a regulation that would allow broader access to the media and the tools of speech. *See ACLU*, 929 F. Supp. at 880 (“Nevertheless, the Supreme Court has resisted governmental efforts to alleviate these market dysfunctions.”).

In analyzing the Court’s view towards market dysfunction arguments and applying access concerns to the Internet, Judge Dalzell declares:

Both *Tornillo* and *Turner* recognize, in essence, that the cure for market dysfunction (government-imposed, content-based speech restrictions) will almost always be worse than the disease. Here, however, I am hard-pressed even to identify the disease. 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 commu-

Justice Stevens summarized Judge Dalzell's construction of "our cases as requiring a 'medium-specific' approach to the analysis of the regulation of mass communication, and [Dalzell] concluded that the Internet—"the most participatory form of mass speech yet developed"—is entitled to the 'highest protection from governmental intrusion.'"³⁵² Judge Dalzell found four characteristics of the Internet which underly the conclusion that Congress could not regulate indecency on the Internet at all.³⁵³ First, the Internet presented very low barriers to entry; second, the barriers were identical for listeners and speakers; third, an "astoundingly diverse content" was viable on the Internet as a result of the low barriers; and finally, the Internet provides access to all speakers.³⁵⁴

The law of print, broadcast, and cable media is replete with cases rejecting the access claims of those who are turned away by media gatekeepers.³⁵⁵ Lack of access is no problem on the Internet; instead, access is the mode of the Internet.³⁵⁶ This

nication: individual citizens of limited means can speak to a worldwide audience on issues of concern to them.

Id. at 881.

Judge Dalzell concludes:

[I]f the goal of our First Amendment jurisprudence is the "individual dignity and choice" that arises from "putting the decision as to what views shall be voiced largely into the hands of each of us," then we should be especially vigilant in preventing content-based regulation of a medium that every minute allows individual citizens actually to make those decisions.

Id. at 881-82 (quoting *Leathers v. Medlock*, 499 U.S. 439, 448-49 (1991)) (citation omitted).

352. *Reno*, 117 S. Ct. at 2340 (quoting *ACLU*, 929 F. Supp. at 883) (citations omitted).

353. *See ACLU*, 929 F. Supp. at 877.

354. *See id.*

355. *See, e.g., FCC v. Midwest Video Corp.*, 440 U.S. 689, 700 (1979) (holding that FCC rules imposing public access requirements on cable systems were invalid because the FCC was without authority to issue them); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 254 (1974) (holding a newspaper right of reply statute violated freedom of the press); *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 120-21 (1973) (holding that the First Amendment did not of its own force provide for a right of access to the broadcast media).

For a rare case where access requirements were upheld, see *CBS, Inc. v. FCC*, 453 U.S. 367, 396-97 (1981) (holding that a federal statute creating a right of "reasonable access" for federal political candidates on broadcasting enhanced rather than restricted freedom of expression). The previously cited cases were distinguished on the ground that the statute in *CBS* created a limited rather than a general right of access. *See id.*

356. *See Jim Carlton & Evan Ramstad, Cheaper PCs Sell Briskly*, *CHI. SUN-TIMES*, Sept. 18, 1997, at 37 (noting that Internet penetration in the United States is

might support an argument that government may not regulate the Internet at all, but Justice Stevens failed to decide that issue because it was not raised by the parties.³⁵⁷ Indeed, the parties acknowledged that the government had a compelling interest in protecting minors from indecent and patently offensive speech.³⁵⁸

Unlike broadcasting, the Internet has developed as an unregulated communications medium.³⁵⁹ Whereas scarcity necessitated the traditional First Amendment standard for broadcasting,³⁶⁰ the Internet is not a "scarce" medium at all.³⁶¹ Therefore, no basis exists for "qualifying the level of First Amendment scrutiny that should be applied to this medium."³⁶²

Justice Stevens agreed with the district court that there was no "effective way to determine the age of a user who is accessing material through e-mail, mail exploders, newsgroups, or chat rooms."³⁶³ Thus, while the only way to effectively bar minors was to deprive adults of access to material subject to First Amendment protection,³⁶⁴ far more narrowly tailored alternatives were available to restrict access to indecent speech to minors without denying it altogether to adults.³⁶⁵

In *Reno*, the Court decided to leave an unregulated medium unregulated: "As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage

around 38% to 40%); *International Telecommunication Union: New ITU Report Tracks Internet Growth and Development*, M2 Presswire, Sept. 15, 1997, available in LEXIS, Market Library, IACNWS File (stating that the number of Internet users worldwide is around sixty million).

357. See *Reno*, 117 S. Ct. at 2340 n.30. Judge Dalzell believed that the four characteristics of the Internet described in the text warranted the conclusion that the Internet could not be regulated at all. See *ACLU*, 929 F. Supp. at 877.

358. See *Reno*, 117 S. Ct. at 2340 n.30.

359. See *id.* at 2343.

360. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 375 (1969).

361. See *Reno*, 117 S. Ct. at 2344 ("[U]nlike the conditions that prevailed when Congress first authorized regulation of the broadcast spectrum, the Internet can hardly be considered a 'scarce' expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds.").

362. *Id.*

363. *Id.* at 2347 (citing *ACLU*, 929 F. Supp. at 845).

364. See *id.* at 2346 ("In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another.").

365. See *id.* at 2348.

it.³⁶⁶ This laissez-faire conclusion of the *Reno* Court is consistent with Justice Souter's wise counsel in the *Denver Area* case: for law as for medicine, the first rule should be to do no harm.³⁶⁷

The cable cases—*Turner I*, *Turner II*, and *Denver Area*—pit classes of speakers against each other. Cable programmers, broadcasters, and system operators all compete with each other to protect their First Amendment interests.³⁶⁸ The cable cases also involve the additional and often competing interests of viewers.³⁶⁹ *Reno* reviewed a restrictive piece of government censorship to which virtually every on-line service, computer, and media organization was opposed.³⁷⁰ When an on-line case which presents a conflict among competing private interests comes before the Court, the Court will be forced to clarify the application of First Amendment doctrine to the Internet.³⁷¹ The *Reno* Court applied strict scrutiny because there was no justification for the all-encompassing nature of the governmental restraint,³⁷² and it would be a mistake to conclude that strict scrutiny will apply universally to all Internet regulation. A rational basis test would have yielded the same result, as the all-encompassing nature of the ban imposed by the CDA was irrational—it was self-evidently undiscriminating for the accomplishment of even legitimate governmental interests.

B. Justice O'Connor: Prophecy of Regulation

Justice O'Connor, joined by Chief Justice Rehnquist, concurred in the judgment in *Reno* in part and also dissented in

366. *Id.* at 2351.

367. *See Denver Area*, 518 U.S. at 778 (Souter, J., concurring).

368. *See* discussion *supra* Parts I.B, II.

369. *See id.*

370. *See Reno*, 117 S. Ct. at 2339 nn.27–28.

371. A possible example of conflicting private-party interests may arise as a result of litigation against America Online for libel. *See* Karen Breslau, *A Capital Cyber Clash*, NEWSWEEK, Oct. 27, 1997, at 63 (discussing a \$30 million libel suit against America Online for allowing a user to post a defamatory statement). If the courts were to begin making on-line services responsible for content placed onto the Internet by their subscribers, on-line services would take a more proactive role in censoring users' views. This would result in the empowerment of the owners of the medium to censor subscribers' messages. In such circumstances, the question of whether there is a right of access to the Internet would have to be confronted.

372. *See Reno*, 117 S. Ct. at 2346–48.

part.³⁷³ Her quarrel with Justice Stevens' opinion for the Court was that it was too unqualified. Justice O'Connor argued that eventually cyberspace will be zoned.³⁷⁴ These zones would grant entry to adults but not to children, adult bookstores or adult theaters being examples of such "zones" in physical or geographic space.³⁷⁵ Such zones, she declared, are valid.³⁷⁶ Justice O'Connor viewed the CDA provisions as an attempt to create such zones.³⁷⁷ Justice O'Connor asserted that gateway technology will allow the government to create adult-only zones on the Internet someday.³⁷⁸ When that day arrives, regulation directed at children found in some of the provisions of the CDA will be valid.³⁷⁹ These provisions are invalid now because cyberspace is currently, as far as most of its users are concerned, unzoned.³⁸⁰ Gateway technology will change this, and the regulation of indecent content directed toward children will ultimately be as valid in cyberspace as it is now in physical space.³⁸¹

Justice O'Connor criticized Justice Stevens' opinion because the opinion neither "accept[s] nor reject[s] the argument that the CDA is facially overbroad."³⁸² She believes the CDA should

373. *See id.* at 2351 (O'Connor, J., concurring in the judgment in part and dissenting in part).

374. *See id.* (O'Connor, J., concurring in the judgment in part and dissenting in part).

375. *See id.* at 2352-53 (O'Connor, J., concurring in the judgment in part and dissenting in part).

376. *See id.* at 2353 (O'Connor, J., concurring in the judgment in part and dissenting in part) ("That is to say, a zoning law is valid if (i) it does not unduly restrict adult access to the material; and (ii) minors have no First Amendment right to read or view the banned material.").

377. *See id.* at 2351 (O'Connor, J., concurring in the judgment in part and dissenting in part).

378. *See id.* (O'Connor, J., concurring in the judgment in part and dissenting in part).

379. *See id.* at 2354 (O'Connor, J., concurring in the judgment in part and dissenting in part).

380. *See id.* (O'Connor, J., concurring in the judgment in part and dissenting in part).

381. *See id.* (O'Connor, J., concurring in the judgment in part and dissenting in part). Justice O'Connor believed that when screening software and other means of controlling gateways are perfected, then it would be constitutionally permissible for the government to require Internet providers to zone access to adult content. *See id.* at 2353-54 (O'Connor, J., concurring in the judgment in part and dissenting in part).

382. *Id.* at 2356 (O'Connor, J., concurring in the judgment in part and dissenting in part). Justice O'Connor's opinion does not reject a medium-specific standard. Justice O'Connor frankly declared that "[a]lthough the prospects for the eventual zoning of the Internet appear promising, I agree with the Court that [it] must evaluate the constitutionality of the CDA as it applies to the Internet as it exists today." *Id.* at 2354 (O'Connor, J., concurring in the judgment in part and dissenting in part).

have been specifically acquitted of overbreadth.³⁸³ Under *Ginsberg v. New York*,³⁸⁴ "minors may constitutionally be denied access to material that is obscene as to minors," but adults may not.³⁸⁵

Justice O'Connor stated that regulation will ultimately come to the Internet, and she wanted the Court in *Reno* to concede this.³⁸⁶ Yet despite this invitation, Justice Stevens declined to so qualify his opinion.

C. The First Amendment Significance of *Reno v. ACLU*

The Stevens opinion in *Reno* can be viewed as an effort to mirror the status of the Internet as a technology in First Amendment law. Bottlenecks or gatekeepers may be inevitable in cable systems because a single operator or entity operates or controls a system. They may be inevitable in VHF television as well because the finite nature of the spectrum limits the number of VHF licenses. Conversely, the Internet is open to all comers—both as speakers and as viewers.³⁸⁷

Professor Sunstein, writing before the *Reno* opinion, argued that, with respect to the Internet and cyberspace, the Court

383. See *id.* at 2355 (O'Connor, J., concurring in the judgment in part and dissenting in part).

384. 390 U.S. 629 (1968).

385. *Reno*, 117 S. Ct. at 2356 (O'Connor, J., concurring in the judgment in part and dissenting in part).

386. See *id.* at 2357 (O'Connor, J., concurring in the judgment in part and dissenting in part). Regulation may come to the Internet because government may be called upon to mediate battles over content and access among private actors. The Anti-Defamation League is planning to distribute software to screen out anti-semitic Websites. See Amy Harmon, *Highway Patrol: The Self-Appointed Cops of the Information Age*, N.Y. TIMES, Dec. 7, 1997, § 4, at 1. The Catholic Information Center, an Internet Service Provider (ISP), is also developing a rating system. See *id.* The purpose of these rating systems is to block out objectionable content, while filtering systems are being developed to block out software. See *id.* The makers of these systems do not inform Internet users which Web Sites are being blocked. See *id.*

The World Wide Web Consortium has designed a filtering system, Platform for Internet Content Selection, which has been criticized by Professor Lawrence Lessig as "hav[ing] the power to grant liberties or encode them away." *Id.* Software filters developed to screen out objectionable content may have the same effect as the most pervasive and censorious government regulation. The Internet's mode now is access, but it is questionable whether this will remain so. The government may have to develop rules to prevent software content filters from transforming the Internet from a free market to one characterized by newly developed bottlenecks—silent software filter systems.

387. See *Reno*, 117 S. Ct. at 2334.

should be casuistic, highly specific, and avoid broad rulings.³⁸⁸ Justice Stevens' opinion was consistent with part of this advice. If a type of technology is a fact, *Reno* is highly fact specific. Indeed, as was the case with Justice Breyer's opinions in *Denver Area* and *Turner II*, *Reno* is highly technology specific. Beyond that, it is medium-specific.³⁸⁹ But the Stevens opinion in the Internet case is not casuistic, but situational. The true First Amendment significance of the *Reno* opinion, therefore, is that the government should leave the Internet as it found it—free of regulation—at least for this moment. Unlike other electronic media, the Internet is not characterized by market failure.³⁹⁰ On the contrary, its pervasive and transforming characteristic is its offer of immediate access.³⁹¹

In *Reno*, Justice Stevens found the government's censorship to be too destructive of adults' access rights. As gateways develop and zones appear, it may be that the Internet will be viewed as less responsive to access rights altogether.³⁹² For Justice Stevens, there was no need to write a decision providing a conclusive rule of First Amendment governance for the Internet. In this respect, the considerations implicitly balanced in *Reno* are very similar to the explicit balancing undertaken by Breyer in *Turner II* and *Denver Area*.

CONCLUSION

Recent First Amendment doctrine—the rise of the strict scrutiny standard and the content-based versus content-neutral test—has progressed toward exclusion of all considerations

388. See Cass R. Sunstein, *Constitutional Caution*, 1996 U. CHI. LEGAL F. 361, 362–63 (1996).

389. See *Reno*, 117 S. Ct. at 2340 (observing with apparent approval that Judge Dalzell in the lower court construed the Supreme Court's First Amendment cases as "medium-specific").

390. See Sunstein, *supra* note 388, at 361.

391. See *Reno*, 117 S. Ct. at 2334–36.

392. As ISPs develop blocking technology that restricts access to various zones, adult access to information may be impeded not by government regulation but by private parties. In addition, the manner in which the Internet content marketplace is developing may restrict Internet users' ability to enter certain websites simply because of the software browser they use. An example of this is Microsoft's contracting with certain websites to only allow users who have Microsoft's browser to enter. See *New Media*, COMM. DAILY, Nov. 14, 1997, available in 1997 WL 13780745. If this trend continues, the inclusive and participatory character of the Internet as a medium may change and the role of access as a First Amendment right will have to be considered.

other than whether content is being regulated. Consequently, the competing First Amendment interests involved are often obscured.

Justice Breyer's new balancing approach identifies the players affected by a regulation. Whereas Justice Thomas believes that only the owner of a medium has any valid First Amendment interests, Justice Breyer recognizes that new media may create new players who have First Amendment interests. The new balancing is more inclusive; the First Amendment interests of all relevant parties are accorded recognition. Note, however, that not all parties affected by a regulation have First Amendment interests.

An explicit example of the new balancing approach is *Turner II*.³⁹³ In *Turner II*, Justice Breyer recognized the First Amendment interests of cable operators, cable programmers, over-the-air broadcasters, and over-the-air viewers. An analysis that identifies all relevant First Amendment interests makes it more likely that these interests will be addressed and will transcend the traditional cursory analysis that recognizes only the First Amendment interests of the media owner.

In addition, the new balancing analyzes the First Amendment interests in the context of the medium to which the government regulation is being applied. In *Pacifica*, the broadcasting context involved factors such as pervasiveness and ease of access that the Court considered. In *Denver Area*, the cable context involved factors like pervasiveness, ease of access, a balancing of four players' interests (the cable operator, the cable programmer, the cable subscriber, and the government), and the natural evolution of technology towards less restrictive methods of regulating.³⁹⁴

Turner II and *Reno* provide perhaps the best examples of the significance of accounting for the media context. In *Turner II*, the Court had to consider the cable medium and its relationship to broadcasting. One important aspect of cable is that it directly competes with free over-the-air broadcasting for both advertisers and viewers. This aspect was especially important in analyzing the effects cable has on the viability of local broadcasters. In *Reno*, the Internet context involved factors that included the necessity of taking affirmative steps to obtain indecent material, the traditionally free atmosphere that permeates the Internet, an individual's ability to

393. See discussion *supra* Part I.

394. See discussion *supra* Part II.A, C-D.

disseminate his or her ideas to a vast number of people, and the evolution towards zones.³⁹⁵

The new balancing recognizes that First Amendment interests conflict and must compete for recognition. No speaker is presumptively preferred over another or over subscribers/viewers. The new balancing approach differs from the old balancing test in that the governmental restraint does not necessarily receive deference, yet the calculus is not necessarily capricious.

The interests most jeopardized by government regulation are those the new balancing seeks to protect. In *Denver Area*, section 10(a) of the 1992 Cable Act promoted the cable operator's interest in editorial control. The only interest in jeopardy was that of the leased access cable programmers', yet section 10(a) was a proper balance between cable operator's editorial interests and programmers' interests. Section 10(b), however, jeopardized operators', programmers', and viewers' interests. Section 10(b) inhibited operators' editorial control, obstructed programmers' ability to have their programming viewed, and infringed on viewers' abilities to choose what programming entered their homes. Section 10(b) was not a proper balance among the First Amendment interests at stake.

In *Turner II*, the Court viewed the challenged must-carry requirements as striking a balance among cable operators, cable programmers, local over-the-air broadcasters, and free over-the-air broadcasting viewers. By acknowledging that over-the-air broadcasters and over-the-air broadcasting viewers' interests were in dire jeopardy of being extinguished, the government could require cable operators to designate a minor number of channels.

In his cable opinions, Justice Breyer displays a number of characteristics that are worthy of attention. First, he is willing to consider an instrumental approach to First Amendment issues, as he disagrees with the conclusion of some of his colleagues that the government has no role to play in accomplishing First Amendment objectives. Second, he understands that both parties to the controversy often have First Amendment interests at stake in such cases. In other words, he understands that interests and values protected by the First Amendment often conflict with each other. Third, he is properly skeptical about established First Amendment doctrine. Fourth, his approach to First Amendment issues is a candid

395. See discussion *supra* Part IV.

one; he will express any First Amendment costs tied to a particular result which he favors. Note that the approaches of Justices Souter and Stevens share these characteristics as well.

Doctrinal constructs to govern the electronic media at this point should be sufficiently elastic and flexible to permit courts to change course if the facts and the technology change radically. When dealing with the electronic media, radical change should be expected. Rather than molding these media to fit doctrinal dogmas, the role of First Amendment doctrine should be to respond to communications realities as they unfold.

The role of the individual in controversies like *Turner* and *Denver Area* is a blurred and distant one. These cases are not cases about regulations that hamper individuals from fully expressing their ideas and beliefs. These are cases about cable operators who control a bottleneck. The issue is whether the First Amendment should be interpreted to allow them to control it completely or not. Mechanical use of a content-based or a content-neutral inquiry results in the invalidation of legislation as long as the regulation can be found to be content-based. The result of this exercise typically leaves the owners of the communications entity involved in complete control. The use of this inquiry also obscures the First Amendment interests of the other players. Thus, the controversy is presented simply as one between the communications operator and the government; and the programmers, community groups, and individual citizens served by the government regulation are removed from view. Justice Breyer's new balancing approach puts them back in First Amendment focus.

