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

The plurality opinion, insofar as it upholds § 10(a) of the 1992 Cable Act, is adrift. The opinion treats concepts such as public forum, broadcaster, and common carrier as mere labels rather than as categories with settled legal signifi-

cance; it applies no standard, and by this omission loses sight of existing First Amendment doctrine. When confronted with a threat to free speech in the context of an emerging technology, we ought to have the discipline to analyze the case by reference to existing elaborations of constant First Amendment principles. This is the essence of the case-by-case approach to ensuring protection of speech under the First Amendment, even in novel settings. Rather than undertake this task, however, the plurality just declares that, all things considered, § 10(a) seems fine. I think the implications of our past cases for these cases are clearer than the plurality suggests, and they require us to hold § 10(a) invalid. Though I join Part III of the opinion (there for the Court) striking down § 10(b) of the Act, and concur in the judgment that § 10(c) is unconstitutional, with respect I dissent from the remainder.

## I

Two provisions of the 1992 Act, §§ 10(a) and (c), authorize the operator of a cable system to exclude certain programming from two different kinds of channels. Section 10(a) concerns leased access channels. These are channels the cable operator is required by federal law to make available to unaffiliated programmers without exercising any control over program content. The statute allows a cable operator to enforce a written and published policy of prohibiting on these channels any programming it "reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards," speech we can refer to as "indecent programming."

Section 10(c) involves public, educational, and governmental access channels (or PEG access channels, as they are known). These are channels set aside for use by members of the public, governmental authorities, and local school systems. As interpreted by the Federal Communications Commission (FCC), § 10(c) requires the agency to make regu-

lations enabling cable operators to prohibit indecent programming on PEG access channels. See *ante*, at 734–736 (quoting statutory provisions in full and discussing interpretive regulations).*

Though the two provisions differ in significant respects, they have common flaws. In both instances, Congress singles out one sort of speech for vulnerability to private censorship in a context where content-based discrimination is not otherwise permitted. The plurality at least recognizes this as state action, *ante*, at 737, avoiding the mistake made by the Court of Appeals, *Alliance for Community Media* v. *FCC*, 56 F. 3d 105, 112–121 (CADC 1995). State action lies in the enactment of a statute altering legal relations between persons, including the selective withdrawal from one group of legal protections against private acts, regardless of whether the private acts are attributable to the State. Cf. *Hunter* v. *Erickson*, 393 U. S. 385, 389–390 (1969) (state action under the Fourteenth Amendment).

The plurality balks at taking the next step, however, which is to advise us what standard it applies to determine whether the state action conforms to the First Amendment. Sections 10(a) and (c) disadvantage nonobscene, indecent programming, a protected category of expression, *Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S. 115, 126 (1989), on the basis of its content. The Constitution in general does not tolerate content-based restriction of, or discrimination against, speech. *R. A. V.* v. *St. Paul*, 505 U. S. 377, 382 (1992) ("Content-based regulations are presumptively invalid"); *Carey* v. *Brown*, 447 U. S. 455, 461–463 (1980); *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 96 (1972). In the

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*The Telecommunications Act of 1996, §§ 506(a), (b), 110 Stat. 136, 137, permits a cable operator to refuse to transmit any leased or public access program or portion thereof which contains "obscenity, indecency, or nudity." The constitutionality of the 1996 amendments, to the extent they differ from the provisions here, is not before us.

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* v. *California,* 403 U. S. 15, 24 (1971). "[E]ach person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal." *Turner Broadcasting System, Inc.* v. *FCC,* 512 U. S. 622, 641 (1994). We therefore have given "the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Id.,* at 642.

Sections 10(a) and (c) are unusual. They do not require direct action against speech, but do authorize a cable operator to deny the use of its property to certain forms of speech. As a general matter, a private person may exclude certain speakers from his or her property without violating the First Amendment, *Hudgens* v. *NLRB,* 424 U. S. 507 (1976), and if §§ 10(a) and (c) were no more than affirmations of this principle they might be unremarkable. Access channels, however, are property of the cable operator, dedicated or otherwise reserved for programming of other speakers or the government. A public access channel is a public forum, and laws requiring leased access channels create common-carrier obligations. When the government identifies certain speech on the basis of its content as vulnerable to exclusion from a common carrier or public forum, strict scrutiny applies. These laws cannot survive this exacting review. However compelling Congress' interest in shielding children from indecent programming, the provisions in these cases are not drawn with enough care to withstand scrutiny under our precedents.

## II

Before engaging the complexities of cable access channels and explaining my reasons for thinking all of § 10 unconstitutional, I start with the most disturbing aspect of the plurality opinion: its evasion of any clear legal standard in deciding these cases. See *ante*, at 741 (disavowing need to "declare which, among the many applications of the general approach that this Court has developed over the years, we are applying here").

The plurality begins its flight from standards with a number of assertions nobody disputes. I agree, of course, that it would be unwise "to declare a rigid single standard, good for now and for all future media and purposes," *ante*, at 742. I do think it necessary, however, to decide what standard applies to discrimination against indecent programming on cable access channels in the present state of the industry. We owe at least that much to public and leased access programmers whose speech is put at risk nationwide by these laws.

In a similar vein, we are admonished, these cases are complicated, not simple; the importance of contextual review, we are told, cannot be evaded by recourse to simple analogies. *Ante*, at 739–743, 748. All this is true, but use of a standard does not foreclose consideration of context. Indeed, if strict scrutiny is an instance of "judicial formulas so rigid that they become a straitjacket that disables government from responding to serious problems," *ante*, at 741, this is a grave indictment of our First Amendment jurisprudence, which relies on strict scrutiny in a number of settings where context is important. I have expressed misgivings about judicial balancing under the First Amendment, see *Burson* v. *Freeman*, 504 U. S. 191, 211–212 (1992) (concurring opinion); *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 124–125 (1991) (opinion concurring in judgment), but strict 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.

The plurality claims its resistance to standards is in keeping with our case law, where we have shown a willingness to be flexible in confronting novel First Amendment problems. The cases it cites, *ante*, at 740–741, however, demonstrate the opposite of what the plurality supposes: In each, we developed specialized or more or less stringent standards when certain contexts demanded them; we did not avoid the use of standards altogether. Indeed, the creation of standards and adherence to them, even when it means affording protection to speech unpopular or distasteful, is the central achievement of our First Amendment jurisprudence. Standards are the means by which we state in advance how to test a law's validity, rather than letting the height of the bar be determined by the apparent exigencies of the day. They also provide notice and fair warning to those who must predict how the courts will respond to attempts to suppress their speech. Yet formulations like strict scrutiny, used in a number of constitutional settings to ensure that the inequities of the moment are subordinated to commitments made for the long run, see *Simon & Schuster*, *supra*, at 115–116; *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 45 (1983), mean little if they can be watered down whenever they seem too strong. They mean still less if they can be ignored altogether when considering a case not on all fours with what we have seen before.

The plurality seems distracted by the many changes in technology and competition in the cable industry. See *ante*, at 741–742; *ante*, at 776–777 (SOUTER, J., concurring). The laws challenged here, however, do not retool the structure of the cable industry or (with the exception of § 10(b)) involve intricate technologies. The straightforward issue here is whether the Government can deprive certain speakers, on the basis of the content of their speech, of protections af-

forded all others. There is no reason to discard our existing First Amendment jurisprudence in answering this question.

While it protests against standards, the plurality does seem to favor one formulation of the question in these cases: namely, whether the Act "properly addresses an extremely important problem, without imposing, in light of the relevant interests, an unnecessarily great restriction on speech." *Ante*, at 743. (Though the plurality frowns on any effort to settle on a form of words, it likes this formulation well enough to repeat it; see *ante*, at 741.) This description of the question accomplishes little, save to clutter our First Amendment case law by adding an untested rule with an uncertain relationship to the others we use to evaluate laws restricting speech. The plurality 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," *ibid.*, is substituted for strict scrutiny, and "extremely important problem," *ante*, at 743, or "extraordinary proble[m]," *ante*, at 741, is substituted for "compelling interest." The admonition that the restriction not be unnecessarily great in light of the interest it serves, *ante*, at 743, 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," *ante*, at 741, "sufficiently tailored," *ante*, at 743, or "carefully and appropriately addressed," *ante*, at 748, to the problems at hand—anything, evidently, except narrowly tailored.

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. I can offer little guidance, except to note the unprotective outcome the plurality reaches here. This is why comparisons and analogies to other areas of our First Amendment case law become a responsibility, rather than the luxury the plurality considers them to be. The comparisons provide discipline to the Court and guidance for others, and give clear content to our standards—all the things I find missing in the plurality's opinion. The novelty and complexity of these cases is a reason to look for help from other areas of our First Amendment jurisprudence, not a license to wander into uncharted areas of the law with no compass other than our own opinions about good policy.

Another troubling aspect of the plurality's approach is its suggestion that Congress has more leeway than usual to enact restrictions on speech where emerging technologies are concerned, because we are unsure what standard should be used to assess them. JUSTICE SOUTER recommends to the Court the precept, "'First, do no harm,'" *ante*, at 778. The question, though, is whether the harm is in sustaining the law or striking it down. If the plurality is concerned about technology's direction, it ought to begin by allowing speech, not suppressing it. We have before us an urgent claim for relief against content-based discrimination, not a dry run.

I turn now to the issues presented, and explain why strict scrutiny is warranted.

## III

### A

Cable operators deliver programming from four sources: retransmission of broadcast stations; programming purchased from professional vendors (including national services like ESPN and Nickelodeon) and delivered by satellite; pro-

grams created by the cable operator itself; and access channels (PEG and leased), the two kinds of programming at issue here. See Mueller, Note, Controversial Programming on Cable Television's Public Access Channels: The Limits of Governmental Response, 38 DePaul L. Rev. 1051, 1056–1057 (1989) (hereinafter Mueller). See also *Turner Broadcasting*, 512 U. S., at 628–629.

PEG access channels grew out of local initiatives in the late 1960's and early 1970's, before the Federal Government began regulating cable television. Mueller 1061. Local franchising was the first form of cable regulation, arising from the need of localities to control access to public rights-of-way and easements and to minimize disruption to traffic and other public activity from the laying of cable lines. See D. Brenner, M. Price, & M. Meyerson, Cable Television and Other Nonbroadcast Video § 3.01[3] (1996) (hereinafter Brenner); *Turner Broadcasting*, *supra*, at 628 ("[T]he cable medium may depend for its very existence upon express permission from local governing authorities"). A local government would set up a franchise authority to oversee the cable system and to negotiate a franchise agreement specifying the cable operator's rights and obligations. See Brenner § 3.01; § 3.01[4] (discussing States where local franchising has now been displaced by state regulation). Cf. 47 U. S. C. § 522(10) (defining franchise authority). A franchise, now mandatory under federal law except for systems operating without them prior to 1984, § 541(b), is an authorization, akin to a license, by a franchise authority permitting the construction or operation of a cable system. § 522(8). From the early 1970's onward, franchise authorities began requiring operators to set aside access channels as a condition of the franchise. See Mueller 1061–1062; D. Agosta, C. Rogoff, & A. Norman, The Participate Report: A Case Study of Public Access Cable Television in New York State 24 (1990) (hereinafter Agosta), attached as Exhibit K to Joint Comments for the Alliance for

Community Media et al., filed with the FCC under MM Docket No. 92–258 (hereinafter FCC Record).

The FCC entered the arena in 1972, requiring the cable companies servicing the country's largest television markets to set aside four access channels (one each for public, educational, governmental, and leased programming) by a date certain, and to add channel capacity if necessary to meet the requirement. *Cable Television Report and Order*, 36 F. C. C. 2d 141, 189–198 (1972). See also *In re Amendment of Part 76 of the Commission's Rules and Regulations Concerning the Cable Television Channel Capacity and Access Channel Requirements of Section 76.251*, 59 F. C. C. 2d 294, 303, 321 (1976) (modifying the 1972 rules). We struck down the access rules as beyond the FCC's authority under the Communications Act of 1934. *FCC* v. *Midwest Video Corp.*, 440 U. S. 689, 708–709 (1979).

When Congress turned its attention to PEG access channels in 1984, it recognized that "reasonable third-party access to cable systems will mean a wide diversity of information sources for the public—the fundamental goal of the First Amendment—without the need to regulate the content of programming provided over cable." H. R. Rep. No. 98–934, p. 30 (1984). It declined, however, to set new federal mandates or authorize the FCC to do so. Since "[a]lmost all recent franchise agreements provide for access by local governments, schools, and non-profit and community groups" over some channels, the 1984 Act instead "continue[d] the policy of allowing cities to specify in cable franchises that channel capacity and other facilities be devoted to such use." *Ibid.*

Section 611 of the Communications Act of 1934, added by the Cable Communications Policy Act of 1984 (1984 Act), authorized local franchise authorities to require cable operators to set aside channel capacity for PEG access when seeking new franchises or renewal of old ones. 47 U. S. C. § 531(b).

Franchise authorities may enforce franchise agreements, § 531(c), but they lack the power to impose requirements beyond those authorized by federal law, § 531(a). But cf. § 557(a) (grandfathering as valid all pre-1984 franchise agreements for the remainder of their term). Federal law also allows a franchise authority to "require adequate assurance that the cable operator will provide adequate public, educational, and governmental access channel capacity, facilities, or financial support." § 541(a)(4)(B). Prior to the passage of § 10(c) of the 1992 Act, the cable operator, save for implementing provisions of its franchise agreement limiting obscene or otherwise constitutionally unprotected cable programming, § 544(d), was forbidden any editorial control over PEG access channels. 47 U. S. C. § 531(e) (1988 ed.).

Congress has not, in the 1984 Act or since, defined what public, educational, or governmental access means or placed substantive limits on the types of programming on those channels. Those tasks are left to franchise agreements, so long as the channels comport in some sense with the industry practice to which Congress referred in the statute.

My principal concern is with public access channels (the P of PEG). These are the channels open to programming by members of the public. Petitioners here include public access programmers and viewers who watch their shows. By contrast, educational and governmental access channels (the E and G of PEG) serve other speakers. Under many franchises, educational channels are controlled by local school systems, which use them to provide school information and educational programs. Governmental access channels are committed by the cable franchise to the local municipal government, which uses them to distribute information to constituents on public affairs. Mueller 1065–1066. No local governmental entity or school system has petitioned for relief in these cases, and none of the petitioners who are viewers has asserted an interest in viewing educational or governmental programming or briefed the relevant issues.

B

The public access channels established by franchise agreements tend to have certain traits. They are available at low or no cost to members of the public, often on a first-come, first-served basis. Brenner § 6.04[3][a]–[b], at 6–38. The programmer on one of these channels most often has complete control over, as well as liability for, the content of its show. *Ibid.;* Mueller 1064. The entity managing the technical aspects of public access, such as scheduling and transmission, is not always the cable operator; it may be the local government or a third party that runs the access centers, which are facilities made available for the public to produce programs and transmit them on the access channels. Brenner § 6.04[7], at 6–48.

Public access channels meet the definition of a public forum. We have recognized two kinds of public fora. The first and most familiar are traditional public fora, like streets, sidewalks, and parks, which by custom have long been open for public assembly and discourse. *Perry*, 460 U. S., at 45; *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496, 515 (1939) (opinion of Roberts, J.). "The second category of public property is the designated public forum, whether of a limited or unlimited character—property that the State has opened for expressive activity by part or all of the public." *International Soc. for Krishna Consciousness, Inc.* v. *Lee*, 505 U. S. 672, 678 (1992).

Public access channels fall in the second category. Required by the franchise authority as a condition of the franchise and open to all comers, they are a designated public forum of unlimited character. The House Report for the 1984 Act is consistent with this view. It characterized public access channels as "the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet. They provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the electronic mar-

ketplace of ideas." H. R. Rep. No. 98–934, *supra*, at 30. Public fora do not have to be physical gathering places, *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 830 (1995), nor are they limited to property owned by the government, *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 800 (1985). Indeed, in the majority of jurisdictions, title to some of the most traditional of public fora, streets and sidewalks, remains in private hands. 10A E. McQuillin, Law of Municipal Corporations § 30.32 (3d ed. 1990); *Hague*, *supra*, at 515 ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions"). Public access channels are analogous; they are public fora even though they operate over property to which the cable operator holds title.

It is important to understand that public access channels are public fora created by local or state governments in the cable franchise. Section § 10(c) does not, as the Court of Appeals thought, just return rightful First Amendment discretion to the cable operator, see *Alliance for Community Media*, 56 F. 3d, at 114. Cable operators have First Amendment rights, of course; restrictions on entry into the cable business may be challenged under the First Amendment, *Los Angeles* v. *Preferred Communications, Inc.*, 476 U. S. 488, 494 (1986), and a cable operator's activities in originating programs or exercising editorial discretion over programs others provide on its system also are protected, *Turner Broadcasting*, 512 U. S., at 636. But cf. *id.*, at 656 (distinguishing discretion of cable operators from that of newspaper editors). Yet the editorial discretion of a cable operator is a function of the cable franchise it receives from local government. The operator's right to exercise any editorial discretion over cable service disappears if its franchise is terminated. See 47 U. S. C. § 541(b) (cable service may not

be offered without a franchise); § 546 (prescribing procedures and standards for renewal). Cf. Brenner § 3.07[9][a] (franchise terms of 15 years are the norm); § 3.07[15] (typical franchise agreements recognize the absolute right of the franchiser to refuse renewal at expiration of term). If the franchise is transferred to another, so is the right of editorial discretion. The cable operator may own the cables transmitting the signal, but it is the franchise—the agreement between the cable operator and the local government—that allocates some channels to the full discretion of the cable operator while reserving others for public access.

In providing public access channels under their franchise agreements, cable operators therefore are not exercising their own First Amendment rights. They serve as conduits for the speech of others. Cf. *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74, 87 (1980). Section 10(c) thus restores no power of editorial discretion over public access channels that the cable operator once had; the discretion never existed. It vests the cable operator with a power under federal law, defined by reference to the content of speech, to override the franchise agreement and undercut the public forum the agreement creates. By enacting a law in 1992 excluding indecent programming from protection but retaining the prohibition on cable operators' editorial control over all other protected speech, the Federal Government at the same time ratified the public-forum character of public access channels but discriminated against certain speech based on its content.

The plurality refuses to analyze public access channels as public fora because it is reluctant to decide "the extent to which private property can be designated a public forum," *ante*, at 742. We need not decide here any broad issue whether private property can be declared a public forum by simple governmental decree. That is not what happens in the creation of public access channels. Rather, in return for granting cable operators easements to use public rights-of-

way for their cable lines, local governments have bargained for a right to use cable lines for public access channels. JUSTICE THOMAS resists public-forum analysis because he sees no evidence of a "formal easement." *Post*, at 828. Under general principles of property law, no particular formalities are necessary to create an easement. Easements may be created by contract. 2 G. Thompson, Commentaries on the Modern Law of Real Property §§ 331–332 (1980); 3 H. Tiffany, The Law of Real Property § 776 (3d ed. 1939). A franchise agreement is a contract, and in those agreements the cable operator surrenders his power to exclude certain programmers from use of his property for specific purposes. A state court confronted with the issue would likely hold the franchise agreement to create a right of access equivalent to an easement in land. So one can even view these cases as a local government's dedication of its own property interest to speech by members of the public. In any event, it seems to me clear that when a local government contracts to use private property for public expressive activity, it creates a public forum.

Treating access channels as public fora does not just place a label on them, as the plurality suggests, see *ante*, at 750. It defines the First Amendment rights of speakers seeking to use the channels. When property has been dedicated to public expressive activities, by tradition or government designation, access is protected by the First Amendment. Regulations of speech content in a designated public forum, whether of limited or unlimited character, are "subject to the highest scrutiny" and "survive only if they are narrowly drawn to achieve a compelling state interest." *Lee*, 505 U. S., at 678. Unless there are reasons for applying a lesser standard, § 10(c) must satisfy this stringent review.

C

Leased access channels, as distinct from public access channels, are those the cable operator must set aside for un-

affiliated programmers who pay to transmit shows of their own without the cable operator's creative assistance or editorial approval. In my view, strict scrutiny also applies to § 10(a)'s authorization to cable operators to exclude indecent programming from these channels.

Congress created leased access channels in the 1984 Act. Section 612 of the Act, as amended, requires a cable system with more than 36 channels to set aside a certain percentage of its channels (up to 15%, depending on the size of the system) "for commercial use by persons unaffiliated with the operator." 47 U. S. C. § 532(b)(1). Commercial use means "provision of video programming, whether or not for profit." § 532(b)(5). When an unaffiliated programmer seeks access, the cable operator shall set "the price, terms, and conditions of such use which are at least sufficient to assure that such use will not adversely affect the operation, financial condition, or market development of the cable system," § 532(c)(1). Cf. 47 CFR § 76.971 (1995) (rules governing terms and conditions of leased access). The price may not exceed the maximum charged any unaffiliated programmer in the same program category for the use of nonaccess channels. § 76.970. Aggrieved programmers have recourse to federal district court and the FCC (if there are repeated violations) to compel access on appropriate terms. 47 U. S. C. §§ 532(d), (e).

Before 1992, cable operators were forbidden editorial control over any video programming on leased access channels, and could not consider the content of the programming except to set the price of access, 47 U. S. C. § 532(c)(2) (1988 ed.). But cf. 47 U. S. C. § 532(h) (prohibiting programs that are obscene or otherwise unprotected under the Constitution on leased access channels). Section 10(a) of the 1992 Act modifies the no-discretion rule by allowing cable operators to reject, pursuant to a written and published policy, programs they reasonably believe to be indecent. § 532(h). Under § 10(b) of the Act, any indecent programming must be

segregated onto one channel and blocked unless the subscriber requests that the channel be provided to him. § 532(j); 47 CFR § 76.701 (1995).

Two distinctions between public and leased access channels are important. First, whereas public access channels are required by state and local franchise authorities (subject to certain federal limitations), leased access channels are created by federal law. Second, whereas cable operators never have had editorial discretion over public access channels under their franchise agreements, the leased access provisions of the 1984 Act take away channels the operator once controlled. Cf. *Midwest Video*, 440 U. S., at 708, n. 17 (federal mandates "compelling cable operators indiscriminately to accept access programming will interfere with their determinations regarding the total service offering to be extended to subscribers"). In this sense, § 10(a) now gives back to the operator some of the discretion it had before Congress imposed leased access requirements in the first place.

The constitutionality under *Turner Broadcasting*, 512 U. S., at 665–668, of requiring a cable operator to set aside leased access channels is not before us. For purposes of these cases, we should treat the cable operator's rights in these channels as extinguished, and address the issue these petitioners present: namely, whether the Government can discriminate on the basis of content in affording protection to certain programmers. I cannot agree with JUSTICE THOMAS, *post*, at 821–822, that the cable operator's rights inform this analysis.

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. The plurality resists any classification of leased access channels (as created in the 1984 Act) as a common-carrier provision, *ante*, at 739–740, although we described in just those

terms the access (including leased access) rules promulgated by the FCC in 1976:

> "The access rules plainly impose common-carrier obligations on cable operators. Under the rules, cable systems are required to hold out dedicated channels on a first-come, nondiscriminatory basis. Operators are prohibited from determining or influencing the content of access programming. And the rules delimit what operators may charge for access and use of equipment." *Midwest Video*, 440 U. S., at 701–702 (citations and footnotes omitted).

Indeed, we struck down the FCC's rules as beyond the agency's statutory authority at the time precisely because they made cable operators common carriers. *Id.*, at 702–709. The FCC characterizes § 612 as a form of common-carrier requirement, App. to Pet. for Cert. 139a–140a, as does the Government, Brief for Federal Respondents 23.

Section 10(a) authorizes cable operators to ban indecent programming on leased access channels. We have held that a law precluding a common carrier from transmitting protected speech is subject to strict scrutiny, *Sable Communications*, 492 U. S., at 131 (striking down ban on indecent telephonic communications), but we have not had occasion to consider the standard for reviewing a law, such as § 10(a), permitting a carrier in its discretion to exclude specified speech.

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

mandate, nonetheless, serves the same function as a public forum. It ensures open, nondiscriminatory access to the means of communication. This purpose is evident in the statute itself and in the committee findings supporting it. Congress described the leased access requirements as intended "to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems." 47 U. S. C. § 532(a). The House Committee reporting the 1984 cable bill acknowledged that, in general, market demand would prompt cable operators to provide diverse programming. It recognized, though, the incentives cable operators might have to exclude "programming which represents a social or political viewpoint that a cable operator does not wish to disseminate, or . . . competes with a program service already being provided by that cable system." H. R. Rep. No. 98–934, at 48. In its view, the leased access provisions were narrowly drawn structural regulations of private industry, cf. *Associated Press* v. *United States*, 326 U. S. 1 (1945), to enhance the free flow and diversity of information available to the public without governmental intrusion into decisions about program content. H. R. Rep. No. 98–934, *supra*, at 32–35. The functional equivalence of designating a public forum and mandating common carriage suggests the same scrutiny should be applied to attempts in either setting to impose content discrimination by law. Under our precedents, the scrutiny is strict.

> "The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place. *Widmar* v. *Vincent*, 454 U. S. 263 (1981) (university meeting facilities); *City of Madison Joint School District* v. *Wisconsin Employment Relations Comm'n*, 429 U. S. 167 (1976) (school board meeting); *Southeast-*

> *ern Promotions, Ltd.* v. *Conrad,* 420 U. S. 546 (1975) (municipal theater). Although a State is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum. Reasonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest." *Perry,* 460 U. S., at 45–46 (footnote omitted).

In *Police Dept. of Chicago* v. *Mosley,* 408 U. S. 92 (1972), we made clear that selective exclusions from a public forum were unconstitutional. Invoking the First and Fourteenth Amendments to strike down a city ordinance allowing only labor picketing on any public way near schools, we held the "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Id.,* at 96.

> "Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone." *Ibid.*

Since the same standard applies to exclusions from limited or unlimited designated public fora as from traditional forums, *Lee,* 505 U. S., at 678, there is no reason the kind of selective exclusion we condemned in *Mosley* should be tolerated here.

The plurality acknowledges content-based exclusions from the right to use a common carrier could violate the First Amendment. It tells us, however, that it is wary of analogies to doctrines developed elsewhere, and so does not address this issue. *Ante,* at 749. This newfound aversion to analogical reasoning strikes at a process basic to legal analy-

sis. See E. Levi, An Introduction to Legal Reasoning 1–2 (1949). I am not suggesting the plurality should look far afield to other areas of law; these are settled First Amendment doctrines dealing with state action depriving certain speakers of protections afforded to all others.

In all events, the plurality's unwillingness to consider our public-forum precedents does not relieve it of the burden of explaining why strict scrutiny should not apply. Except in instances involving well-settled categories of proscribable speech, see *R. A. V.*, 505 U. S., at 382–390, strict scrutiny is the baseline rule for reviewing any content-based discrimination against speech. The purpose of forum analysis is to determine whether, because of the property or medium where speech takes place, there should be any dispensation from this rule. See *Consolidated Edison Co. of N. Y.* v. *Public Service Comm'n of N. Y.*, 447 U. S. 530, 538–539 (1980). In the context of government property, we have recognized an exception "[w]here the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license," and in those circumstances, we have said, regulations of speech need only be reasonable and viewpoint neutral. *Lee*, *supra*, at 678–679. Here, of course, the Government has not dedicated the cable operator's property for leased access to serve some proprietary function of its own; it has done so to provide a forum for a vital class of programmers who otherwise would be excluded from cable television.

The question remains whether a dispensation from strict scrutiny might be appropriate because § 10(a) restores in part an editorial discretion once exercised by the cable operator over speech occurring on its property. This is where public-forum doctrine gives guidance. Common-carrier requirements of leased access are little different in function from designated public fora, and no different standard of review should apply. It is not that the functional equivalence of leased access channels to designated public fora

compels strict scrutiny; rather, it simply militates against recognizing an exception to the normal rule.

Perhaps, as the plurality suggests, *ante*, at 749–750, § 10(a) should be treated as a limitation on a forum rather than an exclusion from it. This would not change the analysis, however. If Government has a freer hand to draw content-based distinctions in limiting a forum than in excluding someone from it, the First Amendment would be a dead letter in designated public fora; every exclusion could be recast as a limitation. See Post, Between Governance and Management: the History and Theory of the Public Forum, 34 UCLA L. Rev. 1713, 1753 (1987). We have allowed content-based limitations of public fora, but only when necessary to serve specific institutional ends. See *Perry*, 460 U. S., at 48 (school mailboxes, if considered designated public fora, could be limited to mailings from "organizations that engage in activities of interest and educational relevance to students"); *Widmar* v. *Vincent*, 454 U. S. 263, 267–268, n. 5 (1981) (recognizing a public university could limit the use of its facilities by reasonable regulations compatible with its mission of education); *Madison Joint School Dist. No. 8* v. *Wisconsin Employment Relations Comm'n*, 429 U. S. 167, 175, n. 8 (1976) (in assessing a teacher's right to speak at a school board meeting, considering it obvious that "public bodies may confine their meetings to specified subject matter"). The power to limit or redefine fora for a specific legitimate purpose, see *Rosenberger*, 515 U. S., at 829–830, does not allow the government to exclude certain speech or speakers from them for any reason at all.

*Madison Joint School Dist.*, *supra*, illustrates the point. The Wisconsin Employment Relations Commission had ordered a school board to prohibit school employees other than union representatives from speaking at its meetings on matters subject to collective bargaining between the board and the union. *Id.*, at 173. While recognizing the power of a State to limit school board meetings to certain subject mat-

ter, we held it could not confine the forum "to one category of interested individuals." *Id.*, at 175. The exclusion would skew the debate and deprive decisionmakers of the benefit of other voices. *Id.*, at 175–176.

It is no answer to say Congress does not have to create access channels at all, so it may limit access as it pleases. Whether or not a government has any obligation to make railroads common carriers, under the Equal Protection Clause it could not define common carriage in ways that discriminate against suspect classes. See *Bailey* v. *Patterson*, 369 U. S. 31, 33 (1962) *(per curiam)* (States may not require railroads to segregate the races). For the same reason, even if Congress has no obligation to impose common-carriage rules on cable operators or retain them forever, it is not at liberty to exclude certain forms of speech from their protection on the suspect basis of content. See *Perry*, *supra*, at 45–46.

I do not foreclose the possibility that the Government could create a forum limited to certain topics or to serving the special needs of certain speakers or audiences without its actions being subject to strict scrutiny. This possibility seems to trouble the plurality, which wonders if a local government must "show a compelling state interest if it builds a band shell in the park and dedicates it solely to classical music (but not to jazz)." *Ante*, at 750. This is not the correct analogy. These cases are more akin to the Government's creation of a band shell in which all types of music might be performed except for rap music. The provisions here are content-based discriminations in the strong sense of suppressing a certain form of expression that the Government dislikes or otherwise wishes to exclude on account of its effects, and there is no justification for anything but strict scrutiny here.

Giving government free rein to exclude speech it dislikes by delimiting public fora (or common-carriage provisions) would have pernicious effects in the modern age. Minds are

not changed in streets and parks as they once were. To an increasing degree, the more significant interchanges of ideas and shaping of public consciousness occur in mass and electronic media. Cf. *United States* v. *Kokinda*, 497 U. S. 720, 737 (1990) (KENNEDY, J., concurring in judgment). The extent of public entitlement to participate in those means of communication may be changed as technologies change; and in expanding those entitlements the Government has no greater right to discriminate on suspect grounds than it does when it effects a ban on speech against the backdrop of the entitlements to which we have been more accustomed. It contravenes the First Amendment to give Government a general license to single out some categories of speech for lesser protection so long as it stops short of viewpoint discrimination.

D

The Government advances a different argument for not applying strict scrutiny in these cases. The nature of access channels to one side, it argues the nature of the speech in question—indecent broadcast (or cablecast)—is subject to the lower standard of review it contends was applied in *FCC* v. *Pacifica Foundation*, 438 U. S. 726, 748 (1978) (upholding an FCC order declaring the radio broadcast of indecent speech during daytime hours to be sanctionable).

*Pacifica* did not purport, however, to apply a special standard for indecent broadcasting. Emphasizing the narrowness of its holding, the Court in *Pacifica* conducted a context-specific analysis of the FCC's restriction on indecent programming during daytime hours. See *id.*, at 750. See also *Sable Communications*, 492 U. S., at 127–128 (underscoring the narrowness of *Pacifica*). It relied on the general rule that "broadcasting . . . has received the most limited First Amendment protection." 438 U. S., at 748. We already have rejected the application of this lower broadcast standard of review to infringements on the liberties of cable operators, even though they control an important communica-

tions medium. *Turner Broadcasting,* 512 U. S., at 637–641. There is even less cause for a lower standard here.

*Pacifica* did identify two important considerations relevant to the broadcast of objectionable material. First, 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 an intruder." 438 U. S., at 748. Second, "broadcasting is uniquely accessible to children, even those too young to read." *Id.,* at 749. *Pacifica* teaches that access channels, even if analogous to ordinary public fora from the standpoint of the programmer, must also be considered from the standpoint of the viewer. An access channel is not a forum confined to a discrete public space; it can bring indecent expression into the home of every cable subscriber, where children spend astounding amounts of time watching television, cf. *ante,* at 744–745 (citing studies). Though in *Cohen* we explained that people in public areas may have to avert their eyes from messages that offend them, 403 U. S., at 21, we further acknowledged that "government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue," *ibid.* See *Hess* v. *Indiana,* 414 U. S. 105, 108 (1973) *(per curiam); Rowan* v. *Post Office Dept.,* 397 U. S. 728, 736–738 (1970). This is more true when the interests of children are at stake. See *id.,* at 738 ("[T]he householder [should not] have to risk that offensive material come into the hands of his children before it can be stopped").

These concerns are weighty and will be relevant to whether the law passes strict scrutiny. They do not justify, however, a blanket rule of lesser protection for indecent speech. Other than the few categories of expression that can be proscribed, see *R. A. V.,* 505 U. S., at 382–390, we have been reluctant to mark off new categories of speech for diminished constitutional protection. Our hesitancy reflects

skepticism about the possibility of courts drawing principled distinctions to use in judging governmental restrictions on speech and ideas, *Cohen*, 403 U. S., at 25, a concern heightened here by the inextricability of indecency from expression. "[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process." *Id.*, at 26. The same is true of forbidding programs indecent in some respect. In artistic or political settings, indecency may have strong communicative content, protesting conventional norms or giving an edge to a work by conveying "otherwise inexpressible emotions." *Ibid.* In scientific programs, the more graphic the depiction (even if to the point of offensiveness), the more accurate and comprehensive the portrayal of the truth may be. Indecency often is inseparable from the ideas and viewpoints conveyed, or separable only with loss of truth or expressive power. Under our traditional First Amendment jurisprudence, factors perhaps justifying some restriction on indecent cable programming may all be taken into account without derogating this category of protected speech as marginal.

## IV

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

The Government has no compelling interest in restoring a cable operator's First Amendment right of editorial discretion. As to § 10(c), Congress has no interest at all, since under most franchises operators had no rights of editorial discretion over PEG access channels in the first place. As to § 10(a), any governmental interest in restoring operator discretion over indecent programming on leased access channels is too minimal to justify the law. First, the transmission of indecent programming over leased access channels

is not forced speech of the operator. *Turner Broadcasting, supra,* at 655–656; *PruneYard,* 447 U. S., at 87. Second, the discretion conferred by the law is slight. The operator is not authorized to place programs of its own liking on the leased access channels, nor to remove other speech (racist or violent, for example) that might be offensive to it or to viewers. The operator is just given a veto over the one kind of lawful speech Congress disdains.

Congress does have, however, a compelling interest in protecting children from indecent speech. *Sable Communications,* 492 U. S., at 126; *Ginsberg* v. *New York,* 390 U. S. 629, 639–640 (1968). See also *Pacifica,* 438 U. S., at 749–750 (same). So long as society gives proper respect to parental choices, it may, under an appropriate standard, intervene to spare children exposure to material not suitable for minors. This interest is substantial enough to justify some regulation of indecent speech even under, I will assume, the indecency standard used here.

Sections 10(a) and (c) nonetheless are not narrowly tailored to protect children from indecent programs on access channels. First, to the extent some operators may allow indecent programming, children in localities those operators serve will be left unprotected. Partial service of a compelling interest is not narrow tailoring. *FCC* v. *League of Women Voters of Cal.,* 468 U. S. 364, 396 (1984) (asserted interest in keeping noncommercial stations free from controversial or partisan opinions not served by ban on station editorials, if such opinions could be aired through other programming); *Florida Star* v. *B. J. F.,* 491 U. S. 524, 540–541 (1989) (selective ban on publication of rape victim's name in some media but not others not narrowly tailored). Cf. *Bolger* v. *Youngs Drug Products Corp.,* 463 U. S. 60, 73 (1983) (restriction that "provides only the most limited incremental support for the interest asserted" cannot pass muster under commercial-speech standards). Put another way, the

interest in protecting children from indecency only at the caprice of the cable operator is not compelling. Perhaps Congress drafted the law this way to avoid the clear constitutional difficulties of banning indecent speech from access channels, but the First Amendment does not permit this sort of ill fit between a law restricting speech and the interest it is said to serve.

Second, to the extent cable operators prohibit indecent programming on access channels, not only children but adults will be deprived of it. The Government may not "reduce the adult population . . . to [viewing] only what is fit for children." *Butler* v. *Michigan*, 352 U. S. 380, 383 (1957). It matters not that indecent programming might be available on the operator's other channels. The Government has no legitimate interest in making access channels pristine. A block-and-segregate requirement similar to § 10(b), but without its constitutional infirmity of requiring persons to place themselves on a list to receive programming, see *ante*, at 756–757, protects children with far less intrusion on the liberties of programmers and adult viewers than allowing cable operators to ban indecent programming from access channels altogether. When applying strict scrutiny, we will not assume plausible alternatives will fail to protect compelling interests; there must be some basis in the record, in legislative findings or otherwise, establishing the law enacted as the least restrictive means. *Sable Communications*, *supra*, at 128–130. Cf. *Turner Broadcasting*, 512 U. S., at 664–668. There is none here.

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 §§ 10(a) and (c) are not drawn to address those reasons with the precision the First Amendment requires.

V

Not only does the plurality fail to apply strict scrutiny, but its reasoning is unpersuasive on its own terms.

The plurality declares § 10(c) unconstitutional because it interferes with local supervisory systems that "can set programming policy and approve or disapprove particular programming services." *Ante*, at 762. Replacing these local schemes with a cable operator veto would, in the plurality's view, "greatly increase the risk that certain categories of programming (say, borderline offensive programs) will not appear," *ante*, at 766. Although the plurality terms these local schemes "public/nonprofit programming control systems," *ante*, at 763, it does not contend (nor does the record suggest) that any local board or access center has the authority to exclude indecent programming, or to do anything that would cast doubt on the status of public access channels as public fora. Cf. Agosta 88 (New York state law forbids editorial control over public access programs by either the cable operator or the municipality); Comments of Hillsborough County Board of County Commissioners 2, FCC Record (explaining county's inability to exclude indecent programming). Indeed, "[m]ost access centers surveyed do not prescreen at all, except, as in [two named localities], a high speed run-through for technical quality." P. Aufderheide, Public Access Cable Programming, Controversial Speech, and Free Expression (1992), reprinted in App. 61, 68. As the plurality acknowledges, the record indicates no response to indecent programming by local access centers (whether they prescreen or not) other than "requiring indemnification by programmers, certification of compliance with local standards, time segregation, [and] adult content advisories," *ante*, at 762. Those are measures that, if challenged, would likely survive strict scrutiny as narrowly tailored to safeguard children. If those measures, in the words of the plurality, "normally avoid, minimize, or eliminate any child-related

problems concerning 'patently offensive' programming" on public access channels, *ante*, at 763–764, one is left to wonder why the cable operator veto over leased access programming authorized in § 10(a) is constitutional even under the plurality's First Amendment analysis. Although I concur in its judgment that § 10(c) is invalid, I cannot agree with the plurality's reasoning.

In regard to § 10(a), the plurality's analysis there undermines its claims of faithfulness to our First Amendment jurisprudence and close attention to context.

First, the plurality places some weight on there being "nothing to stop 'adults who feel the need' from finding [indecent] programming elsewhere, say, on tape or in theaters," or on competitive services like direct broadcast television, *ante*, at 745. The availability of alternative channels of communication may be relevant when we are assessing content-neutral time, place, and manner restrictions, *Ward* v. *Rock Against Racism*, 491 U. S. 781, 791, 802 (1989), but the fact that speech can occur elsewhere cannot justify a content-based restriction, *Southeastern Promotions*, 420 U. S., at 556; *Schneider* v. *State (Town of Irvington)*, 308 U. S. 147, 163 (1939).

Second, the plurality suggests the permissive nature of § 10(a) at least does not create the same risk of exclusion as a total ban on indecency. *Ante*, at 745–746. This states the obvious, but the possibility the Government could have imposed more draconian limitations on speech never has justified a lesser abridgment. Indeed, such an argument almost always is available; few of our First Amendment cases involve outright bans on speech. See, *e. g.*, *Forsyth County* v. *Nationalist Movement*, 505 U. S. 123, 130–137 (1992) (broad discretion of county administrator to award parade permits and to adjust permit fee according to content of speech violates First Amendment); *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58 (1963) (informal threats to recommend criminal prosecutions and other pressure tactics by state moral-

ity commission against book publishers violate the First Amendment).

Third, based on its own factual speculations, the plurality discounts the risks created by the law that operators will not run indecent programming on access channels. The plurality takes "a glance at the programming that cable operators allow on their own (nonaccess) channels," and, espying some indecent programming there, supposes some cable operators may be willing to allow similar programs on leased access channels. *Ante,* at 746. This sort of surmise, giving the Government the benefit of the doubt when it restricts speech, is an unusual approach to the First Amendment, to put it mildly. Worse, it ignores evidence of industry structure that should cast doubt on the plurality's sanguine view of the probable fate of programming considered "indecent" under § 10(a). The plurality fails to note that, aside from the indecency provisions of § 10 tacked on in a Senate floor amendment, the 1992 Act strengthened the regulation of leased access channels because it was feared cable operators would exercise their substantial market power to exclude disfavored programmers. The congressional findings in the statute and the conclusions of the Senate Committee on Commerce, Science, and Transportation after more than two years of hearings on the cable market, see S. Rep. No. 102–92, pp. 3–4 (1991), are instructive. Leased access channels had been underused since their inception in 1984, the Senate Committee determined. *Id.*, at 30. Though it recognized the adverse economics of leased access for programmers may have been one reason for the underutilization, the Committee found the obstinacy of cable operators and their control over prices, terms, and conditions also were to blame. *Id.*, at 31.

> "The cable operator is almost certain to have interests that clash with that of the programmer seeking to use leased access channels. If their interests were similar, the operator would have been more than willing to carry

> the programmer on regular cable channels. The operator thus has already decided for any number of reasons not to carry the programmer. For example, the operator may believe that the programmer might compete with programming that the [operator] owns or controls. To permit the operator to establish the leased access rate thus makes little sense." *Ibid.*

Perhaps some operators will choose to show the indecent programming they now may banish if they can command a better price than other access programmers are willing to pay. In the main, however, leased access programs are the ones the cable operator, for competitive reasons or otherwise, has no interest in showing. And because the cable operator may put to his own commercial use any leased access capacity not taken by unaffiliated programmers, 47 U. S. C. § 532(b)(4), operators have little incentive to allow indecent programming if they have excess capacity on leased access channels.

There is even less reason to think cable operators will choose to show indecent programs on public access channels. The operator is not paid, or paid much, for transmitting programs on these channels; public access programs may compete with the operator's own programs; the operator will wish to avoid unwanted controversy; and here, as with leased access channels, the operator may reclaim unused PEG capacity for its own paid use, 47 U. S. C. § 531(d)(1).

In the 1992 Act, Congress recognized cable operators might want to exclude unaffiliated or otherwise disfavored programmers from their channels, but it granted operators discretion to do so in regard to but a single category of speech. The obvious consequence invited by the discretion is exclusion. I am not sure why the plurality would suppose otherwise, or contend the practical consequences of § 10(a) would be no worse for programmers than those flowing from the sort of time-segregation requirement approved in *Pacifica*. See *ante*, at 746–747. Despite its claim of making

"a more contextual assessment" of these cases, *ante*, at 748, the plurality ignores a key difference of these cases from *Pacifica*. There, the broadcaster wanted to air the speech in question; here, the cable operator does not. So the safe harbor of late-night programming permitted by the FCC in *Pacifica* would likely promote speech, whereas suppression will follow from § 10(a).

VI

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