JUSTICE SOUTER, concurring.

JUSTICE KENNEDY's separate opinion stresses the worthy point that First Amendment values generally are well served by categorizing speech protection according to the respective characters of the expression, its context, and the restriction at issue. Reviewing speech regulations under fairly strict categorical rules keeps the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said.[1] JUSTICE KENNEDY sees no warrant in these cases for anything but a categorical and rule-based approach applying a fixed level of scrutiny, the strictest, to judge the content-based provisions of §§ 10(a), (b), and (c), and he accordingly faults the principal opinion

[1] See, *e. g.*, Blasi, The Pathological Perspective and the First Amendment, 85 Colum. L. Rev. 449, 474 (1985) (arguing that "courts . . . should place a premium on confining the range of discretion left to future decisionmakers who will be called upon to make judgments when pathological pressures are most intense").

for declining to decide the precise doctrinal categories that should govern the issue at hand. The value of the categorical approach generally to First Amendment security prompts a word to explain why I join the Court's unwillingness to announce a definitive categorical analysis in these cases.

Neither the speech nor the limitation at issue here may be categorized simply by content. Our prior case most nearly on point dealt not with a flat restriction covering a separate category of indecency at the First Amendment's periphery, but with less than a total ban, directed to instances of indecent speech easily available to children through broadcasts readily received in the household and difficult or impossible to control without immediate supervision. See *FCC* v. *Pacifica Foundation*, 438 U. S. 726, 747 (1978) (plurality opinion) ("It is a characteristic of speech such as this that both its capacity to offend and its 'social value' . . . vary with the circumstances").[2] It is not surprising that so contextually complex a category was not expressly assigned a standard level of scrutiny for reviewing the Government's limitation at issue there.[3]

Nor does the fact that we deal in these cases with cable transmission necessarily suggest that a simple category sub-

[2] Our indecency cases since *Pacifica* have likewise turned as much on the context or medium of the speech as on its content. See, *e. g.*, *Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S. 115, 127–128 (1989) (distinguishing *Pacifica* in part on the ground that the telephonic medium at issue was less intrusive than broadcast television); *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41, 47, 54 (1986) (permitting zoning regulation of adult theaters based on their "secondary effects"); *Bethel School Dist. No. 403* v. *Fraser*, 478 U. S. 675, 685–686 (1986) (upholding restriction on indecent speech in a public school).

[3] Our analysis of another important strand of the present cases, the right of owners of the means of communication to refuse to serve as conduits for messages they dislike, has been equally contextual. Compare *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367 (1969) (upholding a right-of-reply requirement in the broadcasting context), with *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974) (rejecting such a requirement for print journalism).

ject to a standard level of scrutiny ought to be recognized at this point; while we have found cable television different from broadcast with respect to the factors justifying intrusive access requirements under the rule in *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367 (1969), see *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 638–639 (1994) (finding that *Red Lion*'s spectrum scarcity rationale had no application to cable), today's plurality opinion rightly observes that the characteristics of broadcast radio that rendered indecency particularly threatening in *Pacifica*, that is, its intrusion into the house and accessibility to children, are also present in the case of cable television, *ante*, at 744–745. It would seem, then, that the appropriate category for cable indecency should be as contextually detailed as the *Pacifica* example, and settling upon a definitive level-of-scrutiny rule of review for so complex a category would require a subtle judgment; but there is even more to be considered, enough more to demand a subtlety tantamount to prescience.

All of the relevant characteristics of cable are presently in a state of technological and regulatory flux. Recent and far-reaching legislation not only affects the technical feasibility of parental control over children's access to undesirable material, see, *e. g.*, Telecommunications Act of 1996, § 551, 110 Stat. 139–142 (provision for "V-chip" to block sexually explicit or violent programs), but portends fundamental changes in the competitive structure of the industry and, therefore, the ability of individual entities to act as bottlenecks to the free flow of information, see Title III, *id.*, at 114–128 (promoting competition in cable services). As cable and telephone companies begin their competition for control over the single wire that will carry both their services, we can hardly settle rules for review of regulation on the assumption that cable will remain a separable and useful category of First Amendment scrutiny. And as broadcast, cable, and the cybertechnology of the Internet and the World Wide Web approach the day of using a common receiver, we can

hardly assume that standards for judging the regulation of one of them will not have immense, but now unknown and unknowable, effects on the others.[4]

Accordingly, in charting a course that will permit reasonable regulation in light of the values in competition, we have to accept the likelihood that the media of communication will become less categorical and more protean. Because we cannot be confident that for purposes of judging speech restrictions it will continue to make sense to distinguish cable from other technologies, and because we know that changes in these regulated technologies will enormously alter the structure of regulation itself, we should be shy about saying the final word today about what will be accepted as reasonable tomorrow. In my own ignorance I have to accept the real possibility that "if we had to decide today . . . just what the First Amendment should mean in cyberspace, . . . we would get it fundamentally wrong." Lessig, The Path of Cyberlaw, 104 Yale L. J. 1743, 1745 (1995).

The upshot of appreciating the fluidity of the subject that Congress must regulate is simply to accept the fact that not every nuance of our old standards will necessarily do for the new technology, and that a proper choice among existing doctrinal categories is not obvious. Rather than definitively settling the issue now, JUSTICE BREYER wisely reasons by direct analogy rather than by rule, concluding that the speech and the restriction at issue in these cases may usefully be measured against the ones at issue in *Pacifica*.[5] If

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[4] See, *e. g.*, Lynch, Speedier Access: Cable and Phone Companies Compete, at http://www.usatoday.com/life/cyber/bonus/cb006.htm (June 17, 1996) (describing cable modem technology); Gateway 2000 ships first Destination big screen TV-PC's, at http://www.gw2k.com/corpinfo/press/1996/destin.htm (Apr. 29, 1996) (describing computer with both cable TV and Internet reception capability).

[5] See, *e. g.*, Sunstein, On Analogical Reasoning, 106 Harv. L. Rev. 741, 786 (1993) (observing that analogical reasoning permits "greater flexibility . . . over time"); Sullivan, Post-Liberal Judging: The Roles of Categorization and Balancing, 63 U. Colo. L. Rev. 293, 295, n. 6 (1992) (noting that

that means it will take some time before reaching a final method of review for cases like these, there may be consolation in recalling that 16 years passed, from *Roth* v. *United States*, 354 U. S. 476 (1957), to *Miller* v. *California*, 413 U. S. 15 (1973), before the modern obscenity rule jelled; that it took over 40 years, from *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496 (1939), to *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37 (1983), for the public forum category to settle out; and that a round half-century passed before the clear and present danger of *Schenck* v. *United States*, 249 U. S. 47 (1919), evolved into the modern incitement rule of *Brandenburg* v. *Ohio*, 395 U. S. 444 (1969) *(per curiam)*.

I cannot guess how much time will go by until the technologies of communication before us today have matured and their relationships become known. But until a category of indecency can be defined both with reference to the new technology and with a prospect of durability, the job of the courts will be just what JUSTICE BREYER does today: recognizing established First Amendment interests through a close analysis that constrains the Congress, without wholly incapacitating it in all matters of the significance apparent here, maintaining the high value of open communication, measuring the costs of regulation by exact attention to fact, and compiling a pedigree of experience with the changing subject. These are familiar judicial responsibilities in times when we know too little to risk the finality of precision, and attention to them will probably take us through the communications revolution. Maybe the judicial obligation to shoulder these responsibilities can itself be captured by a much older rule, familiar to every doctor of medicine: "First, do no harm."

"once the categories are established . . . the categorical mode leads to briefs and arguments that concentrate much more on threshold characterization than on comparative analysis").