JUSTICE STEVENS, concurring.

The difference between § 10(a) and § 10(c) is the difference between a permit and a prohibition. The former restores the freedom of cable operators to reject indecent programs; the latter requires local franchising authorities to reject such programs. While I join the Court's opinion, I add these comments to emphasize the difference between the two provisions and to endorse the analysis in Part III–B of JUSTICE KENNEDY's opinion even though I do not think it necessary to characterize the public access channels as public fora. Like JUSTICE SOUTER, I am convinced that it would be unwise to take a categorical approach to the resolution of novel First Amendment questions arising in an industry as dynamic as this. Cf. *R. A. V.* v. *St. Paul*, 505 U. S. 377, 426–427 (1992) (STEVENS, J., concurring in judgment).

I

Federal law requires cable system operators to reserve about 15 percent of their channels for commercial lease to unaffiliated programmers. See 47 U. S. C. § 532(b). On

these channels, federal law generally prohibits the cable operator from exercising any control over program content, see § 532(c)(2), with one exception: Section 10(a) allows the operator to refuse to air "indecent" programs. In my view, that exception is permissible.

The Federal Government established the leased access requirements to ensure that certain programmers would have more channels available to them. 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.

I do not agree, however, that § 10(a) established a public forum. Unlike sidewalks and parks, the Federal Government created leased access channels in the course of its legitimate regulation of the communications industry. In so doing, it did not establish an entirely open forum, but rather restricted access to certain speakers, namely, unaffiliated programmers able to lease the air time. By facilitating certain speech that cable operators would not otherwise carry, the leased access channels operate like the must-carry rules that we considered in *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 643–646 (1994), without reference to our public forum precedents.

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.

Just as Congress may legitimately limit access to these channels to unaffiliated programmers, I believe it may also limit, within certain reasonable bounds, the extent of the ac-

cess that it confers upon those programmers.[1] If the Government had a reasonable basis for concluding that there were already enough classical musical programs or cartoons being telecast—or, perhaps, even enough political debate—I would find no First Amendment objection to an open access requirement that was extended on an impartial basis to all but those particular subjects. A contrary conclusion would ill-serve First Amendment values by dissuading the Government from creating access rights altogether.[2]

Of course, the fact that the Federal Government may be entitled to some deference in regulating access for cable programmers does not mean that it may evade First Amendment constraints by selectively choosing which speech should be excepted from private control. If the Government spared all speech but that communicated by Republicans from the control of the cable operator, for example, the First Amendment violation would be plain. See *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 806

---

[1] Our precedents recognize that reasonable restraints may be placed on access to certain well-regulated fora. There is no reason why cable television should be treated differently. See *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 829 (1995); *id.*, at 892–895, 899 (SOUTER, J., dissenting); see also *Widmar* v. *Vincent*, 454 U. S. 263, 278 (1981) (STEVENS, J., concurring in judgment) ("I should think it obvious, for example, that if two groups of 25 students requested the use of a room at a particular time—one to view Mickey Mouse cartoons and the other to rehearse an amateur performance of Hamlet—the First Amendment would not require that the room be reserved for the group that submitted its application first"); *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 394 (1969) (approving access requirement limited to "matters of great public concern").

[2] For purposes of these cases, canons of constitutional avoidance require us to assume that the Government has the authority to impose leased access requirements on cable operators. Indeed, no party to this litigation contends to the contrary. Because petitioners' constitutional claim depends for its success on the constitutionality of the underlying access rights, they certainly cannot complain if we decide the cases on that assumption.

(1985). More subtle viewpoint-based limitations on access also may be prohibited by the First Amendment. See *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546, 564 (1975) (Douglas, J., dissenting in part and concurring in result in part).

Even though it is often difficult to determine whether a given access restriction impermissibly singles out certain ideas for repression, in these cases I find no basis for concluding that § 10(a) is a species of viewpoint discrimination. By returning control over indecent programming to the cable operator, § 10(a) treats indecent programming on access channels no differently from indecent programming on regular channels. The decision to permit the operator to determine whether to show indecent programming on access channels therefore cannot be said to reflect a governmental bias against the indecent programming that appears on access channels in particular.

Nor can it be argued that indecent programming has no outlet other than leased access channels, and thus that the exclusion of such speech from special protection is designed to prohibit its communication altogether. Petitioners impliedly concede this point when they contend that the indecency restrictions are arbitrarily underinclusive because they do not affect the similarly indecent programming that appears on regular channels.

Moreover, the criteria § 10(a) identifies for limiting access are fully consistent with the Government's contention that the speech restrictions are not designed to suppress "a certain form of expression that the Government dislikes," *post*, at 802 (KENNEDY, J., concurring in part, concurring in judgment in part, and dissenting in part), but rather to protect children from sexually explicit programming on a pervasive medium. In other cases, we have concluded that such a justification is both viewpoint neutral and legitimate. *Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S. 115 (1989);

FCC v. *Pacifica Foundation*, 438 U. S. 726 (1978). There is no reason to conclude otherwise here.

Finally, § 10(a) cannot be assailed on the somewhat broader ground that it nevertheless reduces the programming available to the adult population to what is suitable for children. *Butler* v. *Michigan*, 352 U. S. 380, 383 (1957); *post*, at 807 (KENNEDY, J., concurring in part, concurring in judgment in part, and dissenting in part). Section 10(a) serves only to ensure that the newly created access right will not require operators to expose children to *more* unsuitable communications than would otherwise be the case. It is thus far different in both purpose and effect from the provision at issue in *Butler*, which criminalized the sale of certain books. 352 U. S., at 381.

In sum, § 10(a) constitutes a reasonable, viewpoint-neutral limitation on a federally created access right for certain cable programmers. Accordingly, I would affirm the judgment of the Court of Appeals as to this provision.

II

As both JUSTICE BREYER and JUSTICE KENNEDY have explained, the public, educational, and governmental access channels that are regulated by § 10(c) are not creations of the Federal Government. They owe their existence to contracts forged between cable operators and local cable franchising authorities. *Ante*, at 734, 760–762 (opinion of BREYER, J.); *post*, at 788–790, 791–794 (KENNEDY, J., concurring in part, concurring in judgment in part, and dissenting in part).

As their name reflects, so-called PEG channels are subject to a variety of local governmental controls and regulations that—apart from any federal requirement—may result either in a prohibition or a requirement that certain types of programs be carried. *Ante*, at 761–763 (opinion of BREYER, J.) Presumably, as JUSTICE BREYER explains, the local authorities seldom permit programming of the type described by § 10(c) to air. *Ante*, at 762–763.

What is of critical importance to me, however, is that if left to their own devices, those authorities may choose to carry some programming that the Federal Government has decided to restrict. As I read § 10(c), the federal statute would disable local governments from making that choice. It would inject federally authorized private censors into fora from which they might otherwise be excluded, and it would therefore limit local fora that might otherwise be open to all constitutionally protected speech.[3]

Section 10(c) operates as a direct restriction on speech that, in the absence of federal intervention, might flow freely. The Federal Government is therefore not entitled to the same leeway that I believe it deserves when it enacts provisions, such as § 10(a), that define the limits of federally created access rights. See *supra*, at 769–770. The Federal Government has no more entitlement to restrict the power of a local authority to disseminate materials on channels of its own creation, than it has to restrict the power of cable operators to do so on channels that they own. In this respect, I agree entirely with JUSTICE KENNEDY, save for his designation of these channels as public fora.

That is not to say that the Federal Government may not impose restrictions on the dissemination of indecent materials on cable television. Although indecent speech is protected by the First Amendment, the Government may have a compelling interest in protecting children from indecent speech on such a pervasive medium. *Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S. 115 (1989); *FCC* v. *Pacifica Foundation*, 438 U. S. 726 (1978). When the Gov-

---

[3] Although in 1984 Congress essentially barred cable operators from exercising editorial control over PEG channels, see 47 U. S. C. § 531(e), § 10(c) does not merely restore the status quo *ante*. Section 10(c) authorizes private operators to exercise editorial discretion over "indecent" programming even if the franchising authority objects. Under the pre-1984 practice, local franchising authorities were free to exclude operators from exercising any such control on PEG channels.

ernment acts to suppress directly the dissemination of such speech, however, it may not rely solely on speculation and conjecture. See *Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S., at 129–131.

JUSTICE BREYER persuasively demonstrates that the Government has made no effort to identify the harm caused by permitting local franchising authorities to determine the quantum of so-called "indecent" speech that may be aired in their communities. *Ante*, at 763–766. Nor has the Government attempted to determine whether the intervention of the discretionary censorial authority of a private cable operator constitutes an appropriately limited means of addressing that harm. *Ibid.* Given the direct nature of the restriction on speech that § 10(c) imposes, the Government has failed to carry its burden of justification. Accordingly, I agree that the judgment of the Court of Appeals with respect to § 10(c) should be reversed.