JUSTICE THOMAS, joined by THE CHIEF JUSTICE and JUSTICE SCALIA, concurring in the judgment in part and dissenting in part.

I agree with the principal opinion's conclusion that § 10(a) is constitutionally permissible, but I disagree with its conclusion that §§ 10(b) and (c) violate the First Amendment. For many years, we have failed to articulate how, and to what extent, the First Amendment protects cable operators, programmers, and viewers from state and federal regulation. I think it is time we did so, and I cannot go along with JUSTICE BREYER's assiduous attempts to avoid addressing that issue openly.

I

The text of the First Amendment makes no distinctions among print, broadcast, and cable media, but we have done so. In *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367

(1969), we held that, in light of the scarcity of broadcasting frequencies, the Government may require a broadcast licensee "to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves." *Id.*, at 389. We thus endowed the public with a right of access "to social, political, esthetic, moral, and other ideas and experiences." *Id.*, at 390. That public right left broadcasters with substantial, but not complete, First Amendment protection of their editorial discretion. See, *e. g.*, *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U. S. 94, 117–118 (1973) ("A broadcast licensee has a large measure of journalistic freedom but not as large as that exercised by a newspaper").

In contrast, we have not permitted that level of government interference in the context of the print media. In *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974), for instance, we invalidated a Florida statute that required newspapers to allow, free of charge, a right of reply to political candidates whose personal or professional character the paper assailed. We rejected the claim that the statute was constitutional because it fostered speech rather than restricted it, as well as a related claim that the newspaper could permissibly be made to serve as a public forum. *Id.*, at 256–258. We also flatly rejected the argument that the newspaper's alleged media monopoly could justify forcing the paper to speak in contravention of its own editorial discretion. *Id.*, at 256.

Our First Amendment distinctions between media, dubious from their infancy,[1] placed cable in a doctrinal wasteland in which regulators and cable operators alike could not be sure whether cable was entitled to the substantial First Amendment protections afforded the print media or was

[1] See *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 638, and n. 5 (1994).

subject to the more onerous obligations shouldered by the broadcast media. See *Los Angeles* v. *Preferred Communications, Inc.*, 476 U. S. 488, 496 (1986) (Blackmun, J., concurring) ("In assessing First Amendment claims concerning cable access, the Court must determine whether the characteristics of cable television make it sufficiently analogous to another medium to warrant application of an already existing standard or whether those characteristics require a new analysis"). Over time, however, we have drawn closer to recognizing that cable operators should enjoy the same First Amendment rights as the nonbroadcast media.

Our first ventures into the world of cable regulation involved no claims arising under the First Amendment, and we addressed only the regulatory authority of the Federal Communications Commission (FCC) over cable operators.[2] Only in later cases did we begin to address the level of First Amendment protection applicable to cable operators. In *Preferred Communications*, for instance, when a cable operator challenged the city of Los Angeles' auction process for a single cable franchise, we held that the cable operator had stated a First Amendment claim upon which relief could be granted. *Id.*, at 493. We noted that cable operators communicate various topics "through original programming or by exercising editorial discretion over which stations or programs to include in [their] repertoire." *Id.*, at 494. Cf. *FCC* v. *Midwest Video Corp.*, 440 U. S. 689, 707 (1979) *(Midwest Video II)* ("Cable operators now share with broadcasters a significant amount of editorial discretion regarding what their programming will include"). But we then lik-

[2] See *United States* v. *Southwestern Cable Co.*, 392 U. S. 157 (1968); *United States* v. *Midwest Video Corp.*, 406 U. S. 649 (1972) *(Midwest Video I)*. Our decisions in *Southwestern Cable* and *Midwest Video I* were purely regulatory and gave no indication whether, or to what extent, cable operators were protected by the First Amendment.

ened the operators' First Amendment interests to those of broadcasters subject to *Red Lion*'s right of access requirement. 476 U. S., at 494–495.

Five years later, in *Leathers* v. *Medlock*, 499 U. S. 439 (1991), we dropped any reference to the relaxed scrutiny permitted by *Red Lion.* Arkansas had subjected cable operators to the State's general sales tax, while continuing to exempt newspapers, magazines, and scrambled satellite broadcast television. Cable operators, among others, challenged the tax on First Amendment grounds, arguing that the State could not discriminatorily apply the tax to some, but not all, members of the press. Though we ultimately upheld the tax scheme because it was not content based, we agreed with the operators that they enjoyed the protection of the First Amendment. We found that cable operators engage in speech by providing news, information, and entertainment to their subscribers and that they are "part of the 'press.'" 499 U. S., at 444.

Two Terms ago, in *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622 (1994), we stated expressly what we had implied in *Leathers:* The *Red Lion* standard does not apply to cable television. 512 U. S., at 637 ("[T]he rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation . . . does not apply in the context of cable regulation"); *id.*, at 639 ("[A]pplication of the more relaxed standard of scrutiny adopted in *Red Lion* and the other broadcast cases is inapt when determining the First Amendment validity of cable regulation"). While Members of the Court 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. But see *id.*, at 670 (STEVENS, J., concurring in part and concurring in judgment) ("Cable operators' control of essential facilities provides a

basis for intrusive regulation that would be inappropriate and perhaps impermissible for other communicative media").

In *Turner*, by adopting much of the print paradigm, and by rejecting *Red Lion*, we adopted with it a considerable body of precedent that governs the respective First Amendment rights of competing speakers. In *Red Lion*, we had legitimized consideration of the public interest and emphasized the rights of viewers, at least in the abstract. Under that view, "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." 395 U. S., at 390. After *Turner*, however, that view can no longer be given any credence in the cable context. It is the operator's right that is preeminent. If *Tornillo* and *Pacific Gas & Elec. Co.* v. *Public Util. Comm'n of Cal.*, 475 U. S. 1 (1986), are applicable, and I think they are, see *Turner*, *supra*, at 681–682 (O'CONNOR, J., concurring in part and dissenting in part), then, when 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. Drawing an analogy to the print media, for example, the author of a book is protected in writing the book, but has no right to have the book sold in a particular bookstore without the store owner's consent. Nor can government force the editor of a collection of essays to print other essays on the same subject.

The Court in *Turner* found that the FCC's must-carry rules implicated the First Amendment rights of both cable operators and cable programmers. The rules interfered with the operators' editorial discretion by forcing them to carry broadcast programming that they might not otherwise carry, and they interfered with the programmers' ability to compete for space on the operators' channels. 512 U. S., at 636–637; *id.*, at 675–676 (O'CONNOR, J., concurring in part and dissenting in part). We implicitly recognized in *Turner* that the programmer's right to compete for channel space

is derivative of, and subordinate to, the operator's editorial discretion. Like a freelance 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 freestanding First Amendment right to have that programming transmitted. Cf. *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S., at 256–258. Likewise, the rights of would-be viewers are derivative of the speech rights of operators and programmers. Cf. *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 756–757 (1976) ("Freedom of speech presupposes a willing speaker. But where a speaker exists, . . . the protection afforded is to the communication, to its source and to its recipients both"). Viewers have a general right to see what a willing operator transmits, but, under *Tornillo* and *Pacific Gas*, they certainly have no right to force an unwilling operator to speak.

By recognizing the general primacy of the cable operator's editorial rights over the rights of programmers and viewers, *Turner* raises serious questions about the merits of petitioners' claims. None of the petitioners in these cases are cable operators; they are all cable viewers or access programmers or their representative organizations. See Brief for Petitioners in No. 95–124, pp. 5–6; Brief for Petitioners New York Citizens Committee for Responsible Media et al. in No. 95–227, p. 3; Brief for Petitioners Alliance for Community Media et al. in No. 95–227, p. 3. It is not intuitively obvious that the First Amendment protects the interests petitioners assert, and neither petitioners nor the plurality have adequately explained the source or justification of those asserted rights.

JUSTICE BREYER's detailed explanation of why he believes it is "unwise and unnecessary," *ante*, at 742, to choose a standard against which to measure petitioners' First Amendment claims largely disregards our recent attempt in *Turner*

to define that standard.[3] His attempt to distinguish *Turner* on the ground that it did not involve "the effects of television viewing on children," *ante*, at 748, is meaningless because that factual distinction has no bearing on the existence and ordering of the free speech rights asserted in these cases.

In the process of deciding not to decide on a governing standard, JUSTICE BREYER purports to discover in our cases an expansive, general principle permitting government to "directly regulate speech to address extraordinary problems, where its regulations are appropriately tailored to resolve those problems without imposing an unnecessarily great restriction on speech." *Ante*, at 741. This heretofore unknown standard is facially subjective and openly invites balancing of asserted speech interests to a degree not ordinarily permitted. It is true that the standard I endorse lacks the "flexibility" inherent in the plurality's balancing approach, *ante*, at 740, but that relative rigidity is required by our precedents and is not of my own making.

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, *ante*, at 743, 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. See

[3] Curiously, the plurality relies on "changes taking place in the law, the technology, and the industrial structure related to telecommunications," *ante*, at 742, to justify its avoidance of traditional First Amendment standards. If anything, as the plurality recognizes, *ante*, at 745, those recent developments—which include the growth of satellite broadcast programming and the coming influx of video dialtone services—suggest that local cable operators have little or no monopoly power and create no programming bottleneck problems, thus effectively negating the primary justifications for treating cable operators differently from other First Amendment speakers.

ibid. ("interests of programmers in maintaining access channels"); *ibid.* ("interests served by the access requirements"). It is that question, left unanswered by the plurality, to which I now turn.

II

A

In 1984, Congress enacted 47 U. S. C. § 532(b), which generally requires cable operators to reserve approximately 10 to 15 percent of their available channels for commercial lease to "unaffiliated persons." Operators were prohibited from "exercis[ing] any editorial control" over these leased access channels. § 532(c)(2). In 1992, Congress withdrew part of its prohibition on the exercise of the cable operators' editorial control and essentially permitted operators to censor privately programming that the "operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner." § 532(h).

Since 1984, federal law has also permitted local franchise authorities to require cable operators to set aside certain channels for "public, educational, or governmental use" (PEG channels),[4] § 531(a), but unlike the leased access provisions, has not directly required operators to do so. As with leased access, Congress generally prohibited cable operators from exercising "any editorial control" over public access channels, but provided that operators could prohibit the transmission of obscene programming. § 531(e); see § 544(d). Section 10(c) of the 1992 Act broadened the operators' editorial control and instructed the FCC to promulgate regulations enabling a cable operator to ban from its public access channels "any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct." Note following 47 U. S. C. § 531. The

[4] Because indecent programming on PEG channels appears primarily on public access channels, I will generally refer to PEG access as public access.

FCC subsequently promulgated regulations in its Second Report and Order, *In re Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992: Indecent Programming and Other Types of Materials on Cable Access Channels*, 8 FCC Rcd 2638 (1993) (Second Report and Order). The FCC interpreted Congress' reference to "sexually explicit conduct" to mean that the programming must be indecent, and its regulations therefore permit cable operators to ban indecent programming from their public access channels. *Id.*, at 2640.

As I read these provisions, they provide leased and public access programmers with an expansive and federally enforced statutory right to transmit virtually any programming over access channels, limited only by the bounds of decency. It is no doubt true that once programmers have been given, rightly or wrongly, the ability to speak on access channels, the First Amendment continues to protect programmers from certain Government intrusions. Certainly, under our current jurisprudence, Congress could not impose a total ban on the transmission of indecent programming. See *Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S. 115, 127 (1989) (striking down total ban on indecent dial-a-porn messages). At the same time, however, the Court has not recognized, as entitled to full constitutional protection, statutorily created speech rights that directly conflict with the constitutionally protected private speech rights of another person or entity.[5] We have not found a First Amendment violation in statutory schemes that substantially expand the speech opportunities of the person or entity challenging the scheme.

There is no getting around the fact that leased and public access are a type of forced speech. Though the constitutionality of leased and public access channels is not directly at

[5] Even in *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74, 87–88 (1980), for instance, we permitted California's compelled access rule only because it did not burden or conflict with the mall owner's own speech.

issue in these cases,[6] the position adopted by the Court in *Turner* ineluctably leads to the conclusion that the federal access requirements are subject to some form of heightened scrutiny. See *Turner*, 512 U. S., at 661–662 (citing *Ward* v. *Rock Against Racism*, 491 U. S. 781 (1989); *United States* v. *O'Brien*, 391 U. S. 367 (1968)). Under that view, content-neutral governmental impositions on an operator's editorial discretion may be sustained only if they further an important governmental interest unrelated to the suppression of free speech and are no greater than is essential to further the asserted interest. See *id.*, at 377. Of course, the analysis I joined in *Turner* would have required strict scrutiny. 512 U. S., at 680–682 (O'CONNOR, J., concurring in part and dissenting in part).

Petitioners must concede that cable access is not a constitutionally required entitlement and that the right they claim to leased and public access has, by definition, been governmentally created at the expense of cable operators' editorial

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[6] Following *Turner*, some commentators have questioned the constitutionality of leased and public access. See, *e. g.*, J. Goodale, All About Cable § 6.04[5], pp. 6–38.6 to 6–38.7 (1996) ("In the wake of the Supreme Court's decision in the *Turner Broadcasting* case, the constitutionality of both PEG access and leased access requirements would seem open to searching reexamination. . . . To the extent that an access requirement . . . is considered to be a content-based restriction on the speech of a cable system operator, it seems clear, after *Turner Broadcasting*, that such a requirement would be found to violate the operator's First Amendment rights" (footnotes omitted)); Ugland, Cable Television, New Technologies and the First Amendment After Turner Broadcasting System, Inc. v. F. C. C., 60 Mo. L. Rev. 799, 837 (1995) ("PEG requirements are content-based on their face because they force cable system operators to carry certain *types* of programming" (emphasis in original)); Perritt, Access to the National Information Infrastructure, 30 Wake Forest L. Rev. 51, 66 (1995) (leased access and public access requirements "were called into question in *Turner*"). Moreover, as JUSTICE O'CONNOR noted in *Turner*, Congress' imposition of common-carrier-like obligations on cable operators may raise Takings Clause questions. 512 U. S., at 684 (opinion concurring in part and dissenting in part). Such questions are not at issue here.

discretion. Just because the Court has apparently accepted, for now, the proposition that the Constitution permits some degree of forced speech in the cable context does not mean that the beneficiaries of a Government-imposed forced speech program enjoy additional First Amendment protections beyond those normally afforded to purely private speakers.

We have said that "[i]n the realm of private speech or expression, government regulation may not favor one speaker over another," *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 828 (1995), but this principle hardly supports petitioners' claims, for, if they do anything, the leased and public access requirements favor access programmers over cable operators. I do not see §§ 10(a) and (c) as independent restrictions on programmers, but as intricate parts of the leased and public access restrictions imposed by Congress (and state and local governments) on cable operators. The question petitioners pose is whether §§ 10(a) and (c) are improper restrictions on their free speech rights, but *Turner* strongly suggests that the proper question is whether the leased and public access requirements (with §§ 10(a) and (c)) are improper restrictions on the *operators'* free speech rights. 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. Petitioners' view that the constitutional presumption favors their asserted right to speak on access channels is directly contrary to *Turner* and our established precedents.

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. It is no answer to say that leased and public access are content neutral and that

§§ 10(a) and (c) are not, for that does not change the fundamental fact, which petitioners never address, that it is the operators' journalistic freedom that is infringed, whether the challenged restrictions be content neutral or content based.

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." Outside the public forum doctrine, discussed *infra*, at 826–831, Government intervention that grants access programmers an opportunity to speak that they would not otherwise enjoy—and which does not directly limit programmers' underlying speech rights—cannot be an abridgment of the same programmers' First Amendment rights, even if the new speaking opportunity is content based.

The permissive nature of §§ 10(a) and (c) is important in this regard. If Congress had forbidden cable operators to carry indecent programming on leased and public access channels, that law would have burdened the programmer's right, recognized in *Turner*, *supra*, at 645, to compete for space on an operator's system. The Court would undoubtedly strictly scrutinize such a law. See *Sable*, 492 U. S., at 126. But §§ 10(a) and (c) do not burden a programmer's right to seek access for its indecent programming on an operator's system. Rather, they merely restore part of the editorial discretion an operator would have absent Government regulation without burdening the programmer's underlying speech rights.[7]

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[7] The plurality, in asserting that § 10(c) "does not restore to cable operators editorial rights that they once had," *ante*, at 761, mistakes inability to exercise a right for absence of the right altogether. That cable operators "have not historically exercised editorial control" over public access

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,[8] whose speech rights have been infringed. Consequently, it is the operator, and not the programmer, whose speech has arguably been infringed by these provisions. If Congress passed a law forcing bookstores to sell all books published on the subject of congressional politics, we would undoubtedly entertain a claim by bookstores that this law violated the First Amendment principles established in *Tornillo* and *Pacific Gas.* But I doubt that we would similarly find merit in a claim by publishers of gardening books that the law violated their First Amendment rights. If that is so, then petitioners in these cases cannot reasonably assert that the Court should strictly scrutinize the provisions at issue in a way that maximizes their ability to speak over leased and public access channels and, by necessity, minimizes the operators' discretion.

B

It makes no difference that the leased access restrictions may take the form of common carrier obligations. See *Midwest Video II*, 440 U. S., at 701; see also Brief for Federal Respondents 23. But see 47 U. S. C. § 541(c) ("Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service"). That the leased access provisions may be described in common carrier terms does not demonstrate that access programmers

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channels, *ibid.*, does not diminish the underlying right to do so, even if the operator's forbearance is viewed as a contractual *quid pro quo* for the local franchise.

[8] *Turner* recognized that the must-carry rules burden programmers who must compete for space on fewer channels. 512 U. S., at 636–637. Leased access requirements may also similarly burden programmers who compete for space on nonaccess channels.

have obtained a First Amendment right to transmit programming over leased access channels. Labeling leased access a common carrier scheme has no real First Amendment consequences. It simply does not follow from common carrier status that cable operators may not, with Congress' blessing, decline to carry indecent speech on their leased access channels. Common carriers are private entities and may, consistent with the First Amendment, exercise editorial discretion in the absence of a specific statutory prohibition. Concurring in *Sable*, JUSTICE SCALIA explained: "I note that while we hold the Constitution prevents Congress from banning indecent speech in this fashion, we do not hold that the Constitution requires public utilities to carry it." 492 U. S., at 133. See also *Information Providers' Coalition for Defense of First Amendment* v. *FCC*, 928 F. 2d 866, 877 (CA9 1991) ("[A] carrier is free under the Constitution to terminate service to dial-a-porn operators altogether"); *Carlin Communications, Inc.* v. *Mountain States Telephone & Telegraph Co.*, 827 F. 2d 1291, 1297 (CA9 1987) (same), cert. denied, 485 U. S. 1029 (1988); *Carlin Communication, Inc.* v. *Southern Bell Telephone & Telegraph Co.*, 802 F. 2d 1352, 1357 (CA11 1986) (same).

Nothing about common carrier status *per se* constitutionalizes the asserted interests of petitioners in these cases, and JUSTICE KENNEDY provides no authority for his assertion that common carrier regulations "should be reviewed under the same standard as content-based restrictions on speech in a public forum." *Ante*, at 797. Whether viewed as the creation of a common carrier scheme or simply as a regulatory restriction on cable operators' editorial discretion, the net effect is the same: operators' speech rights are restricted to make room for access programmers. Consequently, the fact that the leased access provisions impose a form of common carrier obligation on cable operators does not alter my view that Congress' leased access scheme burdens the constitutionally protected speech rights of cable operators in order

to expand the speaking opportunities of access programmers, but does not independently burden the First Amendment rights of programmers or viewers.

C

Petitioners argue that public access channels are public forums in which they have First Amendment rights to speak and that § 10(c) is invalid because it imposes content-based burdens on those rights. Brief for Petitioners New York Citizens Committee for Responsible Media et al. in No. 95–227, pp. 8–23; Brief for Petitioners Alliance for Community Media et al. in No. 95–227, pp. 32–35. Though I agree that content-based prohibitions in a public forum "must be narrowly drawn to effectuate a compelling state interest," *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 46 (1983), I do not agree with petitioners' antecedent assertion that public access channels are public forums.

We have said that government may designate public property for use by the public as a place for expressive activity and that, so designated, that property becomes a public forum. *Id.*, at 45. Petitioners argue that "[a] local government does exactly that by requiring as a condition of franchise approval that the cable operator set aside a public access channel for the free use of the general public on a first-come, first-served, nondiscriminatory basis."[9]

[9] In *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 829–830 (1995), we found the university's student activity fund, a nontangible channel of communication, to be a limited public forum, but generally we have been quite reluctant to find even limited public forums in such channels of communication. *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 804 (1985) (Combined Federal Campaign not a limited public forum); *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 47–48 (1983) (school mail facilities not a limited public forum). In any event, we certainly have never held that public access channels are a fully designated public forum that entitles programmers to freedom from content-based distinctions.

Brief for Petitioners Alliance for Community Media et al. in No. 95–227, p. 33. I disagree.

Cable systems are not public property.[10] 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," *Perry Ed. Assn.*, *supra*, at 44, and has never been thought to extend beyond property generally understood to belong to the government. See *International Soc. for Krishna Consciousness, Inc.* v. *Lee*, 505 U. S. 672, 681 (1992) (evidence of expressive activity at rail stations, bus stations, wharves, and Ellis Island was "irrelevant to *public* fora analysis, because sites such as bus and rail terminals traditionally have had *private* ownership" (emphasis in original)). See also *id.*, at 678 (public forum is "government" or "public" property); *Perry Ed. Assn.*, *supra*, at 45 (designated public forum "consists of public property").

Petitioners point to dictum in *Cornelius* v. *NAACP Legal Defense & Ed. Fund*, 473 U. S. 788, 801 (1985), that a public forum may consist of "private property dedicated to public use," but that statement has no applicability here. That statement properly refers to the common practice of formally dedicating land for streets and parks when subdividing real estate for developments. See 1A C. Antieau & J. Antieau, Antieau's Local Government Law § 9.05 (1991); 11A E. McQuillin, Law of Municipal Corporations § 33.03 (3d ed. 1991). Such dedications may or may not transfer title, but they at least create enforceable public easements in the dedicated land. 1A Antieau, *supra*, § 9.15; 11A McQuillin, *supra*,

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[10] See G. Shapiro, P. Kurland, & J. Mercurio, "CableSpeech": The Case for First Amendment Protection 119 (1983) ("Because cable systems are operated by private rather than governmental entities, cable television cannot be characterized as a public forum and, therefore, rights derived from the public forum doctrine cannot be asserted by those who wish to express themselves on cable systems").

§ 33.68. To the extent that those easements create a property interest in the underlying land, it is that government-owned property interest that may be designated as a public forum.

It may be true, as petitioners argue, that title is not dispositive of the public forum analysis, but the nature of the regulatory restrictions placed on cable operators by local franchising authorities is not consistent with the kinds of governmental property interests we have said may be formally dedicated as public forums. Our public forum cases have involved property in which the government has held at least some formal easement or other property interest permitting the government to treat the property as its own in designating the property as a public forum. See, *e. g.*, *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496, 515 (1939) (streets and parks); *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 96 (1972) (sidewalks adjoining public school); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546, 555 (1975) (theater under long-term lease to city); *Carey* v. *Brown*, 447 U. S. 455, 460–462 (1980) (sidewalks in front of private residence); *Widmar* v. *Vincent*, 454 U. S. 263, 267–268 (1981) (university facilities that had been opened for student activities). That is simply not true in these cases. Pursuant to federal and state law, franchising authorities require cable operators to create public access channels, but nothing in the record suggests that local franchising authorities take any formal easement or other property interest in those channels that would permit the government to designate that property as a public forum.[11]

[11] Petitioners' argument that a property right called "the right to exclude" has been transferred to the government is not persuasive. Though it is generally true that, excepting § 10(c), cable operators are forbidden to exercise editorial discretion over public access channels, that prohibition is not absolute. Section 531(e) provides that the prohibition on the exercise of editorial discretion is subject to § 544(d)(1), which permits operators and franchising authorities to ban obscene or other constitutionally unprotected speech. Some States, however, have not permitted exercise of that authority. See, *e. g.*, Minn. Stat. § 238.11 (1994) (prohibiting any censor-

Similarly, assertion of government control over private property cannot justify designation of that property as a public forum. We have expressly stated that neither government ownership nor government control will guarantee public access to property. See *Cornelius*, *supra*, at 803; *Postal Service* v. *Council of Greenburgh Civic Assns.*, 453 U. S. 114, 129 (1981). Government control over its own property or private property in which it has taken a cognizable property interest, like the theater in *Southeastern Promotions*, is consistent with designation of a public forum. But we have never even hinted that regulatory control, and particularly direct regulatory control over a private entity's First Amendment speech rights, could justify creation of a public forum. Properly construed, our cases have limited the government's ability to declare a public forum to property the government owns outright, or in which the government holds a significant property interest consistent with the communicative purpose of the forum to be designated.

Nor am I convinced that a formal transfer of a property interest in public access channels would suffice to permit a local franchising authority to designate those channels as a public forum. 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. Cable operators regularly retain some level of managerial and operational control over their public access channels, subject only to the requirements of federal, state, and local law and the franchise agreement. In more traditional public forums, the government shoulders the burden of administering and enforcing the openness of the expressive forum, but it is frequently a private citizen, the operator, who shoulders that burden for public access channels. For instance,

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ship of leased or public access programming); N. Y. Pub. Serv. Law § 229 (McKinney Supp. 1996) (same). At any rate, the Court has never recognized a public forum based on a property interest "taken" by regulatory restriction.

it is often the operator who must accept and schedule an access programmer's request for time on a channel.[12] And, in many places, the operator is actually obligated to provide production facilities and production assistance to persons seeking to produce access programming.[13] Moreover, unlike a park picketer, an access programmer cannot transmit its own message. Instead, it is the operator who must transmit, or "speak," the access programmer's message. That the speech may be considered the operator's is driven home by 47 U. S. C. § 559, which authorizes a fine of up to $10,000 and two years' imprisonment for any person who "transmits over any cable system any matter which is obscene." See also

[12] See D. Brenner, M. Price, & M. Meyerson, Cable Television and Other Nonbroadcast Video § 6.04[7] (1996) (hereinafter Brenner). Some States and local governments have formed nonprofit organizations to perform some of these functions. See D. C. Code Ann. § 43–1829(a) (1990 and Supp. 1996) (establishing Public Access Corporation "for the purpose of facilitating and governing nondiscriminatory use" of public access channels).

[13] See, *e. g.*, 47 U. S. C. § 541(a)(4)(B) (authorizing franchise authorities to "require adequate assurance that the cable operator will provide adequate public, educational, and governmental access channel capacity, facilities, or financial support"); Conn. Gen. Stat. § 16–331c (1995) (requiring cable operators to contribute money or resources to cable advisory councils that monitor compliance with public access standards); § 16–333(c) (requiring the department of public utility control to adopt regulations "establishing minimum standards for the equipment supplied . . . for the community access programming"); D. C. Code Ann. § 43–1829.1(c) (1990) ("For public access channel users, the franchisee shall provide use of the production facilities and production assistance at an amount set forth in the request for proposal"); Minn. Stat. § 238.084.3(b) (1994) (requiring cable operators to "make readily available for public use at least the minimal equipment necessary for the production of programming and playback of prerecorded programs"). That these activities are "partly financed with public funds," *ante*, at 762, does not diminish the fact that these activities are also "partly financed" with the operator's money. See Brenner § 6.04[7], at 6–48 ("Frequently, access centers receive money and equipment from the cable operator"); *id.*, § 6.04[3][c], at 6–41 (discussing cable operator financing of public access channels and questioning its constitutionality as "forced subsidization of speech").

§ 558 (making operators immune for all public access programming, except that which is obscene).[14]

Thus, even were I inclined to view public access channels as public property, which I am not, the numerous additional obligations imposed on the cable operator in managing and operating the public access channels convince me that these channels share few, if any, of the basic characteristics of a public forum. As I have already indicated, public access requirements, in my view, are a regulatory restriction on the exercise of cable operators' editorial discretion, not a transfer of a sufficient property interest in the channels to support a designation of that property as a public forum. Public access channels are not public forums, and, therefore, petitioners' attempt to redistribute cable speech rights in their favor must fail. For this reason, and the other reasons articulated earlier, I would sustain both § 10(a) and § 10(c).

III

Most sexually oriented programming appears on premium or pay-per-view channels that are naturally blocked from nonpaying customers by market forces, see *In re Implementation of Section 10 of the Consumer Protection and Competition Act of 1992: Indecent Programming and Other Types of Materials on Cable Access Channels, First Report and Order*, 8 FCC Rcd 998, 1001, n. 20 (1993) (First Report and Order), and it is only governmental intervention in the first instance that requires access channels, on which indecent programming may appear, to be made part of the basic cable package. Section 10(b) does nothing more than adjust the nature of Government-imposed leased access requirements

[14] Petitioners argue that § 10(d) of the 1992 Act, 47 U. S. C. § 558, which lifts cable operators' immunity for obscene speech, forces or encourages operators to ban indecent speech. Because Congress could directly impose an outright ban on obscene programming, see *Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S. 115, 124 (1989), petitioners' encouragement argument is meritless.

in order to emulate the market forces that keep indecent programming primarily on premium channels (without permitting the operator to charge subscribers for that programming).

Unlike §§ 10(a) and (c), § 10(b) clearly implicates petitioners' free speech rights. Though § 10(b) by no means bans indecent speech, it clearly places content-based restrictions on the transmission of private speech by requiring cable operators to block and segregate indecent programming that the operator has agreed to carry. Consequently, § 10(b) must be subjected to strict scrutiny and can be upheld only if it furthers a compelling governmental interest by the least restrictive means available. See *Sable*, 492 U. S., at 126. The parties agree that Congress has a "compelling interest in protecting the physical and psychological well-being of minors" and that its interest "extends to shielding minors from the influence of [indecent speech] that is not obscene by adult standards." *Ibid.* See *Ginsberg* v. *New York*, 390 U. S. 629, 639 (1968) (persons "who have th[e] primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility"). Because § 10(b) is narrowly tailored to achieve that well-established compelling interest, I would uphold it. I therefore dissent from the Court's decision to the contrary.

Our precedents establish that government may support parental authority to direct the moral upbringing of their children by imposing a blocking requirement as a default position. For example, in *Ginsberg*, in which we upheld a State's ability to prohibit the sale of indecent literature to minors, we pointed out that the State had simply imposed its own default choice by noting that "the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children." *Ibid.* Likewise, in *Sable* we set aside a complete ban on indecent dial-a-porn messages in part because the FCC had previously imposed certain default rules intended to prevent access by minors,

and there was no evidence that those rules were ineffective. 492 U. S., at 128–130.[15]

The Court strikes down § 10(b) by pointing to alternatives, such as reverse blocking and lockboxes, that it says are less restrictive than segregation and blocking. Though these methods attempt to place in parents' hands the ability to permit their children to watch as little, or as much, indecent programming as the parents think proper, they do not effectively support parents' authority to direct the moral upbringing of their children. See First Report and Order, 8 FCC Rcd, at 1000–1001.[16] The FCC recognized that leased access programming comes "from a wide variety of independent sources, with no single editor controlling [its] selection and presentation." *Id.*, at 1000. Thus, indecent programming on leased access channels is "especially likely to be shown randomly or intermittently between non-indecent programs." *Ibid.* Rather than being able to simply block out certain channels at certain times, a subscriber armed with only a lockbox must carefully monitor all leased access programming and constantly reprogram the lockbox

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[15] After *Sable*, Congress quickly amended the statute and the FCC again promulgated those "safe harbor" rules. Those rules were later upheld against a First Amendment challenge. See *Dial Information Servs. Corp. of N. Y.* v. *Thornburgh*, 938 F. 2d 1535 (CA2 1991), cert. denied, 502 U. S. 1072 (1992); *Information Providers' Coalition for Defense of First Amendment* v. *FCC*, 928 F. 2d 866 (CA9 1991). In promulgating regulations pursuant to § 10(b), the FCC was well aware that the default rules established for dial-a-porn had been upheld and asserted that similar rules were necessary for leased access channels. See First Report and Order, 8 FCC Rcd 998, 1000 (1993) ("The blocking scheme upheld in these cases is, in all relevant respects, identical to that required by section 10(b)"); *ibid.* ("[J]ust as it did in section 223 relating to 'dial-a-porn' telephone services—Congress has now determined that mandatory, not voluntary, blocking is essential").

[16] In the context of dial-a-porn, courts upholding the FCC's mandatory blocking scheme have expressly found that voluntary blocking schemes are not effective. See *Dial Information Servs.*, *supra*, at 1542; *Information Providers' Coalition*, *supra*, at 873–874.

to keep out undesired programming. Thus, even assuming that cable subscribers generally have the technical proficiency to properly operate a lockbox, by no means a given, this distinguishing characteristic of leased access channels makes lockboxes and reverse blocking largely ineffective.

Petitioners argue that § 10(b)'s segregation and blocking scheme is not sufficiently narrowly tailored because it requires the viewer's "written consent," 47 CFR § 76.701(b) (1995); it permits the cable operator 30 days to respond to the written request for access, § 76.701(c); and it is impermissibly underinclusive because it reaches only leased access programming.

Relying on *Lamont* v. *Postmaster General*, 381 U. S. 301 (1965), petitioners argue that forcing customers to submit a written request for access will chill dissemination of speech. In *Lamont*, we struck down a statute barring the mail delivery of "'communist political propaganda'" to persons who had not requested the Post Office in writing to deliver such propaganda. *Id.*, at 307. The law required the Post Office to keep an official list of persons desiring to receive communist political propaganda, *id.*, at 303, which, of course, was intended to chill demand for such materials. Here, however, petitioners' allegations of an official list "of those who wish to watch the 'patently offensive' channel," as the majority puts it, *ante*, at 754, are pure hyperbole. The FCC regulation implementing § 10(b)'s written request requirement, 47 CFR § 76.701(b) (1995), says nothing about the creation of a list, much less an official Government list. It requires only that the cable operator receive written consent. Other statutory provisions make clear that the cable operator may not share that, or any other, information with any other person, including the Government. Section 551 mandates that all personally identifiable information regarding a subscriber be kept strictly confidential and further requires cable operators to destroy any information that is no longer necessary for the purpose for which it was collected. 47 U. S. C. § 551.

None of the circumstances that figured prominently in *Lamont* exists here.

Though petitioners cannot reasonably fear the specter of an officially published list of leased access indecency viewers, it is true that the fact that a subscriber is unblocked is ascertainable, if only by the cable operator. I find no legally significant stigma in that fact. If a segregation and blocking scheme is generally permissible, then a subscriber's access request must take some form, whether written or oral, and I see nothing nefarious in Congress' choice of a written, rather than an oral, consent.[17] Any request for access to blocked programming—by whatever method—ultimately will make the subscriber's identity knowable.[18] But this is hardly the kind of chilling effect that implicates the First Amendment.

Though making an oral request for access, perhaps by telephone, is slightly less bothersome than making a written request, it is also true that a written request is less subject to fraud "by a determined child." *Ante*, at 759. Consequently, despite the fact that an oral request is slightly less restrictive in absolute terms, it is also less effective in supporting parents' interest in denying enterprising, but parentally unauthorized, minors access to blocked programming.

The segregation and blocking requirement was not intended to be a replacement for lockboxes, V-chips, reverse blocking, or other subscriber-initiated measures. Rather, Congress enacted in § 10(b) a default setting under which a subscriber receives no blocked programming without a writ-

[17] Because, under the circumstances of these cases, I see no constitutionally significant difference between a written and an oral request to see blocked programming, I also see no relevant distinction between § 10(b) and the blocking requirement enacted in the 1996 Act, on which the majority places so much reliance. See *ante*, at 756–758.

[18] Indeed, persons who request access to blocked programming pursuant to 47 CFR § 76.701(c) (1995) are no more identifiable than persons who subscribe to sexually oriented premium channels, because those persons must specially request that premium service.

ten request. Thus, subscribers who do not want the blocked programming are protected, and subscribers who do want it may request access. Once a subscriber requests access to blocked programming, however, the subscriber remains free to use other methods, such as lockboxes, to regulate the kind of programming shown on those channels in that home.[19] Thus, petitioners are wrong to portray § 10(b) as a highly ineffective method of screening individual programs, see Brief for Petitioners in No. 95–124, at 43, and the majority is similarly wrong to suggest that a person cannot "watch a single program . . . without letting the 'patently offensive' channel in its entirety invade his household for days, perhaps weeks, at a time," *ante*, at 754; see *ante*, at 756. Given the limited scope of § 10(b) as a default setting, I see nothing constitutionally infirm about Congress' decision to permit the cable operator 30 days to unblock or reblock the segregated channel.

Petitioners also claim that § 10(b) and its implementing regulations are impermissibly underinclusive because they apply only to leased access programming. In *R. A. V.* v. *St. Paul*, 505 U. S. 377 (1992), we rejected the view that a content-based restriction is subject to a separate and independent "underinclusiveness" evaluation. *Id.*, at 387 ("In our view, the First Amendment imposes not an 'underinclusiveness' limitation but a 'content discrimination' limitation upon a State's prohibition of proscribable speech"). See also *ante*, at 757 ("Congress need not deal with every problem at once"). Also, petitioners' claim is in tension with the constitutional principle that Congress may not impose a remedy that is more restrictive than necessary to satisfy its asserted compelling interest and with their own arguments pressing that very principle. Cf. *R. A. V.*, *supra*, at 402 (White, J., concurring in judgment) (though the "overbreadth doctrine

[19] The lockbox provision, originally passed in 1984, was unaffected by the 1992 Act and remains fully available to every subscriber. 47 U. S. C. § 544(d)(2).

has the redeeming virtue of attempting to avoid the chilling of protected expression," an underbreadth challenge "serves no desirable function").

In arguing that Congress could not impose a blocking requirement without also imposing that requirement on public access and nonaccess channels, petitioners fail to allege, much less argue, that doing so would further Congress' compelling interest. While it is true that indecent programming appears on nonaccess channels, that programming appears almost exclusively on "per-program or per channel services that subscribers must specifically request in advance, in the same manner as under the blocking approach mandated by section 10(b)." First Report and Order, 8 FCC Rcd, at 1001, n. 20.[20] In contrast to these premium services, leased access channels are part of the basic cable package, and the segregation and blocking scheme Congress imposed does nothing more than convert sexually oriented leased access programming into a free "premium service."[21] Similarly, Congress' failure to impose segregation and blocking requirements on public access channels may have been based on its judgment that those channels presented a less severe problem of unintended indecency—it appears that most of the anecdotal evidence before Congress involved leased access channels. Congress may also have simply de-

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[20] In examining the restrictions imposed by the 1996 Act, the majority is probably correct to doubt that "sex-dedicated channels are all (or mostly) leased channels," *ante,* at 757, but surely the majority does not doubt that most nonleased sex-dedicated channels are premium channels that must be expressly requested. I thus disagree that the provisions of the 1996 Act address a "highly similar problem." *Ante,* at 758.

[21] Unlike Congress' blocking scheme, and the market norm of requiring viewers to pay a premium for indecent programming, lockboxes place a financial burden on those seeking to avoid indecent programming on leased access channels. See 47 U. S. C. § 544(d)(2) ("[A] cable operator shall provide (by sale or lease) a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber").

cided to permit the States and local franchising authorities to address the issue of indecency on public access channels at a local level, in accordance with the local rule policies evinced in 47 U. S. C. § 531. In any event, if the segregation and blocking scheme established by Congress is narrowly tailored to achieve a compelling governmental interest, it does not become constitutionally suspect merely because Congress did not extend the same restriction to other channels on which there was less of a perceived problem (and perhaps no compelling interest).

The United States has carried its burden of demonstrating that § 10(b) and its implementing regulations are narrowly tailored to satisfy a compelling governmental interest. Accordingly, I would affirm the judgment of the Court of Appeals in its entirety. I therefore concur in the judgment upholding § 10(a) and respectfully dissent from that portion of the judgment striking down §§ 10(b) and (c).