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Cable TV, Indecency and the Court

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Cable TV, Indecency and the Court

by Jonathan Weinberg*

On the next-to-last day of the 1995 Term, the Supreme Court issued its decision in Denver Area Educational Tele-Communications Consortium v. FCC. The Court struck down two provisions of the Cable Television Protection and Competition Act of 1992. The first concerned cable systems' "public access" channels. Under the Cable Communications Policy Act of 1984, local franchise authorities may require cable operators to dedicate certain channels to programming created by members of the community; the cable operators may not exercise editorial control over any programming on those channels. The 1992 law, as implemented by the FCC, created an exception to that no-censorship rule: it authorized cable operators to ban any programming on public access channels that depicted or described "sexual or excretory activities or organs in a patently offensive manner." The Justices found that that exception violated the First Amendment. The Court upheld a similar provision authorizing cable operators to ban such programming from leased access channels, but struck down language requiring cable...

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4. Id. § 2 at 2782 (codified in relevant part at 47 U.S.C. § 531(e)).
5. The 1992 Act § 10(c) at 1486 (codified at note after 47 U.S.C. § 531). Section 10(c) of the 1992 Act directed the FCC to promulgate regulations enabling cable operators to bar from public access channels "any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct." A later statutory amendment provided that "a cable operator may refuse to transmit any public access program or portion of a public access program which contains obscenity, indecency, or nudity." Pub. L. 104-104, 110 Stat. 137 § 506(a) (1996) (codified in relevant part at 47 U.S.C. § 531(e)). The FCC promulgated regulations authorizing cable operators to bar from public access channels "any programming which contains nudity, obscene . . . or indecent material . . . , or material soliciting or promoting unlawful conduct." 47 C.F.R. § 76.702. It defined "indecent material" to include "any programming that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium." Id. (incorporating definition id. § 76.701(g)). It defined "material soliciting or promoting unlawful conduct" to mean "material that is otherwise proscribed by law." Id.
6. The 1984 Cable Act required cable operators to set aside certain channels "for commercial use by persons unaffiliated with the operator," on a common-carrier basis. Cable operators were forbidden to "exercise any editorial control over any video programming provided" on leased-access channels. There was one exception, though: Cable operators were directed not to provide service if the programming "in the judgment of the
operators that did carry such programming on leased channels to segregate it on a single channel and to block viewing of that channel except by subscribers who had requested access in writing.\(^7\)

The Court did not speak with a single voice: the Justices wrote six separate opinions in support of four different results.\(^8\) The opinions are extraordinary. In the D.C. Circuit, the judges had agonized over the question whether a statute merely authorizing cable operators not to carry certain speech could amount to "state action" implicating the First Amendment.\(^9\) But none of the Justices thought that question worth more than a paragraph. Each of them, rather, addressed state action concerns implicitly, as part of his First Amendment discussion. The plurality's treatment of state action, on close analysis, is the hardest to explain.

The tone of the plurality opinion, moreover, is curious. The opinion explicitly declined to address doctrinal issues, such as public-forum law, that at first blush seemed unavoidable. Given the changing law, technology and industrial structure of telecommunications, Justice Breyer explained, it would be inappropriate to even consider those matters.\(^10\) To do so would divest the Court of necessary flexibility,

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\(^7\) The 1992 Act §10(b) at 1486 (codified at 47 U.S.C. § 532(j); 47 C.F.R. § 76.701(b)&(c)).


\(^9\) See Denver Area, 116 S.Ct. at 2384-85.
locking it into rigid “categorical” approaches. Instead, he continued, it would be better to engage in a “contextual” assessment. The plurality, thus, forswore any analysis based on abstract First Amendment doctrine.

An initial answer to the riddles of the plurality opinion can be found in FCC v. Pacifica Foundation (in which the Court upheld indecency regulation of over-the-air TV and radio). Pacifica is the lodestone of the plurality opinion both doctrinally and jurisprudentially. It helps explain both the plurality’s state action analysis and its approach to the First Amendment. In many ways, though, the centrality of Pacifica is the most surprising thing about the Denver Area plurality opinion. As a lower-court judge had confidently written less than three weeks earlier, “[t]ime has not been kind to the Pacifica decision.” In Denver Area, a Supreme Court plurality revived Pacifica’s contextual style, and rehabilitated the case as a model for regulation of cable television. As a result, Pacifica’s reasoning and jurisprudential approach, thought by many to have been quietly interred, are back. Justice Breyer wrote in the Denver Area plurality opinion that he was approaching the case contextually, setting aside abstract doctrine, because of “the changes taking place in the law, the technology, and the industrial structure.” The deeper message of the plurality opinion, though, is that no matter how technology evolves, Pacifica’s contextual approach will continue to guide regulation of media that feel like television.

In Part I of this Article, I will offer some background, setting the Denver Area case in perspective. In Part II, I will describe the Denver Area opinions, explore the apparent dematerialization of state action analysis from the Justices’ chambers, and investigate the plurality’s rejection of First Amendment rules. In Part III, I will suggest that Pacifica provides the answers to the problems set out above. I will try to explain how Pacifica — one of the Court’s most reviled cases, troubling “[m]ost people with any first amendment bones in their bodies” — made such a comeback.

11. Id. at 2384.
12. Id. at 2388.
15. 116 S. Ct. at 2385.
17. For a different, excellent analysis of Denver Area, which became available to me as this Article was going to press, see Monroe Price & John Duffy, Technological Change and Doctrinal Persistence: Telecommunications Reform in Congress and the Court, 97 COLUM. L. REV. ___ (1997) (forthcoming May 1997).
I. INDECENCY ON CABLE

The roots of the Denver Area controversy lie in the 1960s, when local franchising authorities first required cable operators to provide their customers with a channel on which citizens could distribute their own programming to the community. Cities came to require these “public access” channels routinely, as a condition of the cable operator’s franchise. In 1972, the FCC sought to federalize access requirements: It published a rule requiring, among other things, that each cable system in the country's top 100 markets provide “one dedicated, noncommercial public access channel available without charge at all times on a first-come, first-served nondiscriminatory basis.” That channel was supposed to provide a “practical opportunity to participate in community dialogue through a mass medium.” Cable systems in the same markets were also required to make channel capacity available for leased access. The Commission pre-empted all state and local regulation of public access channels, except that franchising authorities in the smallest markets (where the FCC rule didn’t apply) could require such channels if they chose.

The Commission emphasized that cable operators were not to permit the distribution of obscene or indecent programming on public-access or leased channels. Every cable operator had the obligation to see that such material was not broadcast. The Commission recognized that, as a practical matter, cable operators could not monitor all access programming in advance. But once an operator was put on notice that a

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21. See id. at 191-92. The Commission directed cable operators in the relevant markets to promulgate rules providing for “non-discriminatory access on a first-come, first-served basis with the appropriate rate schedule specified.” It contemplated that “there will be experimentation, with some channels used entirely for advertising, some following the pattern of commercial broadcasts, and others of [origination cablecasting],” and pledged to monitor developments. Id. at 195.
22. Id. at 193-94. If a franchising authority in such a market did require an access channel, that channel would be governed by FCC rules. Id. at 197-98.
particular programmer might disseminate questionable material, it was obligated to "take appropriate steps" to ensure that that programmer stayed within the rules.\(^{25}\)

That requirement did not last long: the D.C. Circuit found that it amounted to an unconstitutional prior restraint.\(^ {26}\) On remand, the agency agreed that "a rule which requires the cable system to censor programming on a channel set aside as a public forum, to which the programmer has a right of access by virtue of local, state or federal law, would impose a system of prior restraint in violation of" the First Amendment.\(^ {27}\) It repealed its old rules.\(^ {28}\) At about the same time, the Supreme Court held that the FCC's overall access-channel requirement was invalid, because beyond the agency's statutory authority.\(^ {29}\) The Commission repealed those rules as well.\(^ {30}\)

In the early 1980s, thus, while local franchising authorities commonly required cable operators to provide public access channels, federal law did not address public access at all. That changed with the passage of the Cable Communications Policy Act of 1984.\(^ {31}\) That statute, a hard-negotiated compromise between cable and local-government lobbyists, formalized the local franchising process. It provided explicitly that franchising authorities could require public access channels, and required that "a cable operator shall not exercise any editorial control

\(^{25}\) Id. at 985. The agency added:

"Obviously, there will be situations where a program is not proscribed by our rule but, in the opinion of the cable operator, might prove distasteful to some subscribers. We, of course, cannot and should not attempt to regulate such situations. There is no constitutional safeguard against unpleasantness. [But] as a matter of taste and common sense it would be appropriate for such programming to be cablecast at hours that would tend to minimize its exposure to children. Our rules do not require such scheduling, but... neither do they prohibit it."

Id.


\(^{27}\) Cable Television Channel Capacity and Access Channel Requirements, 87 F.C.C.2d 40, 42 (1981).


\(^{30}\) Cable Television Channel Capacity and Access Channel Requirements, 83 F.C.C.2d 147 (1980).

over any public . . . use of channel capacity” on such a channel.\textsuperscript{32} The House Report described those channels as “the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet.”\textsuperscript{33} The statute's rule of programming freedom incorporated just one exception: a franchising authority could exempt from the common

carriage obligation programming that was “obscene or otherwise unprotected by the Constitution of the United States.”\textsuperscript{34}

The statute also required cable systems to offer leased access channels (although its failure to provide meaningful guidance as to the rates cable operators could charge for access left the provision largely ineffective).\textsuperscript{35} It indicated that programming was not entitled to leased access if “in the judgment of the franchising authority [it] is obscene, or is in conflict with community standards in that it is lewd, lascivious, filthy or indecent or is otherwise unprotected by the Constitution of the United States.”\textsuperscript{36}

When Congress was considering a major revision of the cable television laws in 1992,\textsuperscript{37} Senator Helms and others rose to complain that the 1984 law was inadequate to keep “filthy,” “perverted and disgusting” sexually-explicit programming off leased-access channels.\textsuperscript{38} According to a letter Senator Helms inserted in the Congressional Record, existing law was insufficient because it left the power to exclude sexually explicit programming in the hands of franchising authorities.\textsuperscript{39} Local authorities' constitutional power to exclude particular leased-access providers was questionable,\textsuperscript{40} and in any event “very few if any” franchising authorities were inclined to exercise that power.\textsuperscript{41} According to Senator Fowler, public-access channels were being abused just as badly: they were being used “to basically solicit prostitution.”\textsuperscript{42} Senators Helms and Fowler proposed, and the Senate adopted without dissent, three floor amendments designed to address these problems.

\begin{footnotesize}
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\textsuperscript{32} Id. § 2 at 2782 (codified in relevant part at 47 U.S.C. § 531(e)).
\textsuperscript{34} The 1984 Act § 2 at 2790 (codified in relevant part at 47 U.S.C. § 544(d)(1)).
\textsuperscript{35} \textit{See} THOMAS G. KRATENMAKER, TELECOMMUNICATIONS LAW AND POLICY 321 (1994); \textit{see also} Time Warner Entertainment Co. v. F.C.C., 93 F.3d 957, 967-70 (D.C. Cir. 1996). In the 1992 Cable Consumer Protection and Competition Act, Congress directed the FCC to promulgate regulations ensuring that cable systems price leased access at affordable levels. Those new regulations have also been criticized as ineffective, and the FCC is re-examining them. \textit{See} Cable Rate Regulation (Reconsideration of Commercial Leased Access Requirements), 2 Comm. Reg. (P & F) 989 (Mar. 29, 1996).
\textsuperscript{36} The 1984 Act § 2 at 2785 (codified in relevant part at 47 U.S.C. § 532(h)).
\textsuperscript{39} Id. at S647-S648 (letter from Robert Peters, attorney, Morality in Media).
\textsuperscript{40} Id. (citing City of Paducah v. Investment Entertainment, Inc., 791 F.2d 463 (6th Cir.), \textit{cert. denied}, 479 U.S. 915 (1986), and Midwest Video Corp. v. FCC, 571 F.2d 1025, 1056-57 (8th Cir. 1978), \textit{aff’d}, 440 U.S. 689 (1979)).
\textsuperscript{41} Id. at S648.
\textsuperscript{42} Id. at S649 (comments of Sen. Fowler).
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Two of the amendments were proposed by Senator Helms. The first, concerning leased-access channels, empowered cable operators "to enforce prospectively a written and published policy of prohibiting programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." To the extent cable operators chose to allow indecent programming on leased-access channels, the amendment required them to place that programming on a single channel and block that channel unless a subscriber requested access in writing. This became sections 10(a) and (b) of the 1992 Act.

On the floor of the Senate, Senator Helms explained that the new language was constitutionally unproblematic. The first provision — allowing cable operators to exclude sexually explicit speech — was constitutional because it did not require the cable systems to take any action. It merely "allow[ed] a private company to make independent decisions to exclude certain objectionable material"; there was no government action and hence no censorship.

The second provision — requiring cable operators to segregate and block indecent programming — merely tracked federal dial-a-porn regulation.

Senator Helms’ second amendment involved 47 U.S.C. § 558, which exempted cable operators from civil or criminal liability for material carried on public-access or leased-access channels. The 1984 law, Helms said, had allowed a cable company to carry the Playboy channel on a leased-access channel, free from worries that it could be prosecuted for obscenity. Under the new amendment — which became section 10(d) of the 1992 Act — cable systems’ immunity was lifted for obscene material. A cable operator could permit sexually explicit programming on a leased-access or public access channel only at the risk of itself being prosecuted on obscenity charges.

Senator Fowler’s amendment directed the FCC to promulgate regulations empowering cable operators to exclude “obscene material, sexually explicit conduct or material soliciting or promoting unlawful

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43. Id. at S646.
44. Id.
45. The 1992 Act § 10(a) & (b) at 1486 (codified at 47 U.S.C. § 532(j) & (h)).
47. Id. at S646-S647. Current law requires dial-a-porn providers to use credit card authorization, access codes or scrambling in order to limit access to consenting adults over 18. Further, if the telephone company chooses to provide billing and collection services for a dial-a-porn provider, it may not provide any access except to homes that have previously requested, in writing, that it do so. See 47 C.F.R. § 64.201; Dial Info. Serv. Corp. v. Thornburgh, 938 F.2d 1535 (2d Cir. 1991); Information Providers’ Coalition v. FCC, 928 F.2d 866 (9th Cir. 1991).
48. 138 Cong. Rec. at S652.
conduct" from public-access channels.\textsuperscript{50} Like Senator Helms's amendments, it passed without dissent; it became section 10(c) of the 1992 Act.\textsuperscript{51} The larger statute became law on October 5, 1992.

Programmers and viewers' organizations sought review of these provisions in court. A panel of the D.C. Circuit struck down sections 10(a) and (c) — the provisions allowing cable systems to exclude indecent material from leased-access and public-access channels — as unconstitutional.\textsuperscript{52} The panel found that decisions by cable operators denying carriage to sexually explicit programming, pursuant to the 1992 statutory amendments, should be deemed "state action," chargeable to the government.\textsuperscript{53} The statute as amended required cable operators to carry all speech on access channels except that which the government wanted to suppress, and empowered cable operators to reject exactly — and only — that speech the government wished to eliminate. Both the goal of the statutory amendments and their plain effect was to limit the transmission of indecent material. Under Supreme Court authority including \textit{Reitman v. Mulkey},\textsuperscript{54} the panel concluded, the government was responsible for any cable system choices barring indecent programming; the statute had created "a form of sophisticated discrimination whereby the [government] . . . harness[ed] the energies of private groups to do indirectly" what it could not constitutionally do itself.\textsuperscript{55} Once the case was seen as one in which the government (indirectly) imposed blanket bans on indecent speech on access channels, it was plain that the statute was unconstitutional; the government's action failed the test of narrow tailoring appropriate for content-based regulation.\textsuperscript{56}

\textsuperscript{50} 138 Cong. Rec. at S649. In proscribing material promoting "unlawful conduct," Sen. Fowler was apparently referring to prostitution. The FCC implementing regulations translate "material soliciting or promoting unlawful conduct" as "material that is otherwise proscribed by law." 47 C.F.R. § 76.702.

\textsuperscript{51} The 1992 Act § 10(c) at 1486 (codified at note after 47 U.S.C. § 531).


\textsuperscript{53} Id. at 818-22.

\textsuperscript{54} 387 U.S. 369 (1967). In \textit{Reitman}, the Court struck down a California state constitutional amendment prohibiting the state from denying the "right of any person [to] decline to sell, lease or rent [property] to such person or persons as he, in his absolute discretion, chooses." It was one thing, the Court said, merely to repeal state fair housing laws, and another to enshrine a right to racial discrimination in the State's basic charter. See \textit{id.} at 374-77.

\textsuperscript{55} 10 F.3d at 822 (quoting Reitman v. Mulkey, 387 U.S. at 383 (Douglas, J., concurring)).

\textsuperscript{56} The statute, in those circumstances, could be justified only if it were the least restrictive means of furthering the government's interest. It was uncontested, though, that "a total ban on indecent programming is not the least restrictive alternative." \textit{Id.} at 823. The court remanded so that the FCC could consider how — and whether — it could implement § 10(b) of the 1992 Act in light of the court's ruling. \textit{Id.} at 824-31.
Sitting *en banc*, the D.C. Circuit took the opposite view. Judge Randolph, writing for the majority, explained that any actions taken by cable operators to exclude indecent programming from access channels, in the wake of the 1992 Act, should not be attributable to the government. The statute neither coerced nor encouraged; it merely gave cable operators the choice whether to carry particular programming. In transferring editorial discretion from access programmers to cable operators — who, after all, were the owners of the systems in question — the 1992 amendments gave rise to no “state action” implicating the First Amendment.

As for the segregate-and-block requirement of section 10(b), it was the least restrictive means of furthering the government’s compelling interest in protecting the physical and psychological well-being of minors.

The Supreme Court granted *cert.*

II. **DENVER AREA**

I will begin this section by sketching the approaches of the three principal opinion-writers in the *Denver Area* case — Justices Breyer, Kennedy and Thomas. Their opinions display two crucial themes. The

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57. 56 F.3d 105 (D.C. Cir. 1995).

58. The majority cited Flagg Brothers, Inc. *v.* Brooks, 436 U.S. 149 (1978), for the proposition that the mere passage of a statute authorizing private action does not itself constitute state action sufficient to trigger constitutional analysis. 56 F.3d at 113. The statute’s leased-access and public-access provisions, the majority continued, did impose common-carrier obligations on cable operators. But that fact “does not render [their] facilities ‘public forums’ in the First Amendment sense and does not transform [their] discretionary carriage decisions into decisions of the government.” *Id.* at 123.

59. *Id.* at 123-25.

60. I will not discuss the less substantial opinions of Justices Stevens, O’Connor, and Souter. Justices Stevens and Souter each wrote short concurring opinions, and Justice O’Connor a short opinion dissenting in part. The most interesting of these is Justice Souter’s. Souter defended Justice Breyer’s contextual approach, notwithstanding that “First Amendment values generally are well-served by” categorical rules, on the ground that the technology of electronic communications was moving too fast for the Court “to risk the finality of precision.” 116 S. Ct. at 2403 (Souter, J., concurring). “[A]s broadcast, cable and the cyber-technology 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.” *Id.* at 2402.

Justice Stevens explained that in his view the leased-access provision was permissible, because it constituted a reasonable, viewpoint-neutral limitation on a novel access right created by the federal government. The public-access limitation, by contrast, would allow “federally authorized private censors” to override local governments’ decisions about carriage “on channels of [the local governments’] own creation.” *Id.* at 2400 (Stevens, J., concurring). Justice O’Connor, by contrast, urged that the public-access and leased-access provisions were indistinguishable, and should both be upheld. *Id.* at 2403 (O’Connor, J., concurring in part and dissenting in part).
first is the apparent disappearance of state action analysis. The Justices expended remarkably few words on state action, notwithstanding its centrality to the judges below. With one insignificant exception, none of the Denver Area opinions even mentions any of the decisions in the Court's long line of "state action" precedent. Rather, for the most part, they address the issue by indirection. Justice Breyer's opinion for the plurality presents an especially puzzling example of vanishing state action analysis; I will attempt to explain that disappearance in section III.

The second theme relates to the tension between categorization and balancing as modes of constitutional analysis. One can identify two recurrent styles of constitutional decision making, each a polar opposite of the other. In the first, judges resolve legal questions through the application of hard-edged, black-letter rules that determine the pigeonhole into which each case will be sorted; once that pigeonhole has been determined, analysis is largely at an end. This style is sometimes referred to as categorization; the black-letter rules central to it are commonly referred to, reasonably enough, as rules. In the second mode, judges resolve legal questions through the case-by-case, ad hoc, contextual weighing of the policy considerations that bring themselves to bear on the particular facts of the particular case. This style, in constitutional analysis, is referred to as particularism or balancing.

61. The plurality cites Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94 (1973) (in which some of the Justices addressed the question whether a broadcaster policy of refusing to accept editorial advertising should be attributable to the state), but only as part of a string of cases standing for the proposition that the Court's First Amendment broadcasting cases "have dealt with government efforts to restrict, not... to... maintain, a broadcaster's freedom to pick and choose programming." 116 S. Ct. at 2383.

Justice Kennedy, in his three-sentence state action discussion, awards a "cf." cite to Hunter v. Erickson, 393 U.S. 385 (1969), an equal protection case that does not explicitly phrase its analysis in state action terms. 116 S. Ct. at 2405.


63. See, e.g., Sullivan, Post-Liberal Judging, supra note 62, at 293-94.

64. See, e.g., Frederick Schauer, Rules and the Rule of Law, 14 HARV. J. L. & PUB. POL'y 645 (1991); Sunstein, supra note 62.

The debate between categorization and balancing is a long-standing one in First Amendment thought. In this respect, too, though, Justice Breyer’s opinion presents a puzzle.

A. WHAT THEY SAID

1. Justice Breyer

Justice Breyer’s plurality opinion begins by announcing that the case is not really about “state action” at all.

Although the [D.C. Circuit] said that it found no “state action,” it could not have meant that phrase literally, for, of course, petitioners attack (as “abridging speech”) a congressional statute — which, by definition, is an Act of “Congress.” More likely, the court viewed this statute’s “permissive” provisions as not themselves restricting speech, but, rather, as simply reaffirming the authority to pick and choose programming that a private entity, say, a private broadcaster, would have had in the absence of intervention by any federal, or local, governmental entity.

Breyer recognized that issues associated with the D.C. Circuit’s state action concerns made the case problematic. “[T]he First Amendment, the terms of which apply to governmental action, ordinarily does not itself throw into constitutional doubt the decisions of private citizens to permit, or to restrict, speech.” If the Court upheld petitioners’ claims, vindicating petitioners’ autonomy as First Amendment speakers, it necessarily would limit the autonomy of cable-system operators to engage in their own First Amendment activity. He continued by describing arguments petitioners advanced in favor of finding state action: cable operators have monopoly power, allowing them to engage in private censorship if unchecked; they are extraordinarily involved with government; and, as

66. See, e.g., Sullivan, Post-Liberal Judging, supra note 62, at 293-94. “Particularism” and “balancing” refer to different facets of this form of analysis. Particularism refers to the fact that the decision maker operates contextually, focusing on the particular facts of the case rather than on larger, abstract rules. Balancing refers to the fact that the decision maker seeks to do justice by weighing the competing policy considerations appearing on the facts of the given case.


68. Joined by Justices Stevens and Souter, and in part by Justice O’Connor.


70. Id. at 2383.
a realistic matter, their First Amendment interests as editors are weak.\textsuperscript{71}

After setting out these competing arguments, though, Justice Breyer set aside the issue, and turned to First Amendment analysis. The overriding question, he explained, was whether the statute's provisions "properly address[ ] an extremely important problem, without imposing, in light of the relevant interests, an unnecessarily great restriction on speech."\textsuperscript{72} He explained that he would not address a variety of doctrinal questions. Justice Kennedy, for example, argued that public-access channels were First Amendment public forums. Breyer declared it "unnecessary, indeed, unwise, for us definitively to decide whether or how" the public forum doctrine applied.\textsuperscript{73} Rather, the plurality could decide the case "more narrowly."\textsuperscript{74} First Amendment doctrines such as those relied on by Justice Kennedy provided mere "imprecise analogies"; it was better to seek to provide "a more contextual assessment, consistent with our First Amendment tradition, of assessing whether Congress carefully and appropriately addressed a serious problem."\textsuperscript{75}

To aid that analysis, Breyer explained, he would look to the "essence" of the Court's First Amendment cases.\textsuperscript{76} That "essence," he continued, was that government has power "to address the most serious problems."\textsuperscript{77} (He cited Chaplinsky \textit{v. New Hampshire},\textsuperscript{78} Young \textit{v. American Mini-Theatres}\textsuperscript{79} and FCC \textit{v. Pacifica Foundation},\textsuperscript{80} setting up the hard-to-avoid inference that the nation's "most serious problems" over the history of the First Amendment have been insults, dirty movies and four-letter words.) Speech regulation must be "appropriately tailored to resolve those problems without imposing an unnecessarily great restriction on speech."\textsuperscript{81} Government "may not regulate speech except in cases of extraordinary need and with the exercise of a degree of care that we have not elsewhere required."\textsuperscript{82}

\begin{itemize}
\item \textsuperscript{71} Id.
\item \textsuperscript{72} Id. at 2385.
\item \textsuperscript{73} Id. at 2388.
\item \textsuperscript{74} Id. at 2385. This presented an unusual understanding of what it means to decide a case "narrowly." Conventionally, we describe an opinion as deciding a case more narrowly than another when it reaches the same result as the other, but on more limited grounds. Here, though, Justice Breyer's distillation of the cases led him to apply a different standard than Justice Kennedy's strict scrutiny, and to reach a different result. See id. at 2387-88.
\item \textsuperscript{75} Id. at 2388.
\item \textsuperscript{76} Id. at 2384.
\item \textsuperscript{77} Id.
\item \textsuperscript{78} 315 U.S. 568 (1942).
\item \textsuperscript{79} 427 U.S. 50 (1976).
\item \textsuperscript{80} 438 U.S. 726 (1978).
\item \textsuperscript{81} 116 S.Ct. at 2385.
\item \textsuperscript{82} Id. at 2384.
\end{itemize}
Justice Breyer’s contextual assessment led him to divergent results in evaluating the public-access and leased-access provisions. After evaluating a “complex balance of interests,” he concluded that the leased-access provision was constitutional.83 “[T]he need to protect children from exposure to patently offensive sex-related material” was extremely important, and had often been found compelling.84 The provision was merely permissive, and served to empower cable operators even as it disadvantaged access programmers. The case raised the same concerns about accessibility of indecent speech to children, and invasion of the “privacy of the home,” as did the Court’s 1978 decision in FCC v. Pacifica Foundation85 (in which a plurality upheld FCC action disciplining a radio station for broadcasting an “indecent” monologue on a weekday afternoon86). Indeed, the two cases presented “remarkably similar” problems, and the 1992 amendments embodied a balance commensurate with the one Pacifica approved.87 As in Pacifica, adults desiring to view such speech could find it elsewhere. The provision was likely less restrictive than that upheld in Pacifica, because individual cable operators might choose not to exercise their veto, or might choose to do so only during daytime hours.88

Public-forum analysis, Breyer continued, could not legitimately lead to a different result.

[The effects of Congress’ decision on the interests of programmers, viewers, cable operators, and children are the same, whether we characterize Congress’ decision as one that limits access to a public forum, discriminates in common carriage, or constrains speech because of its content. If we consider this particular limitation of indecent television programming acceptable as a constraint on speech, we must no less accept the limitation it places on access to the claimed public forum . . . .89

Even if the Court engaged in public-forum analysis, he continued, unless “a label alone were to make a critical First Amendment difference . . . the features of this case that we have already discussed — the government’s interest in protecting children, the ‘permissive’ aspect of the statute, and the nature of the medium — sufficiently justify the ‘limitation’ on the availability of this forum.”90

83. Id. at 2387.
84. Id. at 2386.
87. 116 S. Ct. at 2386.
88. Id. at 2387.
89. Id. at 2389.
90. Id.
The plurality's balancing yielded the opposite result when it comes to public-access channels. Those were channels, Justice Breyer reasoned, that the cable operator had not historically controlled; cable operators had agreed to reserve them for public use as part of the franchise conditions. Their use was normally supervised by access channel managers, often nonprofit organizations, and those channel managers were capable of addressing the issue of indecent programming should it arise. In that context, granting the cable operator a veto over indecent programming was less crucial, and the risk bulked larger that cable operators would erroneously bar programming that was not in fact offensive. Indeed, the record showed no "significant nationwide pattern" of indecent speech on public-access channels. The provision allowing cable operators to reject indecent speech on public-access channels, thus, was unconstitutional because insufficiently tailored to the government's legitimate ends.

2. Justice Kennedy

Justice Kennedy, like Justice Breyer, began his opinion by discussing state action. Like Justice Breyer, he saw no need to waste words on the issue.

In [the 1992 amendments], 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, avoiding the mistake made by the Court of Appeals. State action lies in the enactment of a statute altering legal relations between persons, including the selective withdrawal from one group of protections from private acts, regardless of whether the private acts are attributable to the State.

The 1992 amendments obviously met that standard.
Kennedy’s approach to the First Amendment issues in the case was strikingly different from Breyer’s. He argued energetically, and with some force, that both the leased-access and the public-access provisions before the Court were unconstitutional. Rather than engaging in a balancing analysis, he started from the premise that the First Amendment renders suspect any statute drawing distinctions on content-based grounds. The 1992 amendments were problematic because they regulated speech non-neutrally, giving crucial weight to content-based distinctions.

Public access channels, Kennedy argued, are government-created public forums. Local governments initially conditioned the franchise on promises from cable operators that they would dedicate channels for expressive activity; “when a local government contracts to use private property for public expressive activity, it creates a public forum.”96 Because the 1992 amendments deny programmers of “indecent” speech access to a public forum, he continued, they are subject to strict scrutiny. The analysis for leased-access channels, minus the “public forum” label, was the same: there was no public forum “in the sense of taking property from private control and dedicating it to public use,” but government had created a functionally equivalent common-carrier obligation.97 Once government had imposed a mandate “ensur[ing] open, nondiscriminatory access to the means of communication,” it subjected itself to strict scrutiny when it removed its “protection from a single form of speech based on its content.”98 Both of the permissive provisions, Justice Kennedy continued, failed strict scrutiny because they were not narrowly tailored to achieve their stated goals.99

3. Justice Thomas

Justice Thomas’s analysis100 contains no explicit discussion of state action. His starting point, as emphatic as that of Justice Kennedy, leads him to the opposite result: First Amendment rights subsist, first and foremost, in the owners of the communications resources used to disseminate the speech. In the cable television context, that means “[i]t is the [cable system] operator’s right that is preeminent. . . . [W]hen there is a conflict, a programmer’s asserted right to transmit over an

96. 116 S.Ct. at 2410.
97. Id. at 2412.
98. Id.
99. Id. at 2416-17. Justice Kennedy joined the portion of Justice Breyer’s opinion holding that § 10(b), the “segregate-and-block” provision, was unconstitutional. Id. at 2419; see supra note 92.
100. Joined by Chief Justice Rehnquist and Justice Scalia.
operator’s cable system must give way to the operator’s editorial discretion.\textsuperscript{101}

Thomas questioned whether petitioners — programmers and viewers — could assert First Amendment rights at all in Denver Area. After all, the access right was statutory, not constitutionally based; few would argue that the Constitution routinely grants programmers a right to use somebody else’s privately-owned equipment to disseminate their speech.\textsuperscript{102} While programmers have a First Amendment right “to compete for space on an operator’s system,”\textsuperscript{3} so that the Constitution would demand strict scrutiny of a law forbidding the carriage of indecent programming on access channels, the direction of the constitutional pull is always in favor of the operator’s editorial autonomy. An editorial decision by the private-sector cable operator cannot give rise to a violation of programmers’ First Amendment rights.

Thomas emphasized that public-access and leased-access requirements displace cable operators from selecting programming on certain channels, notwithstanding that the cable operator owns the programming hardware. Public-access and leased-access requirements thus impinge on the cable operators’ own First Amendment interests, imposing on cable operators “a type of forced speech.”\textsuperscript{104} Cable operators, in short, were the injured parties; it could not violate programmers’ First Amendment rights that the government had chosen to burden cable operators’

\begin{itemize}
\item \textsuperscript{101} 116 S.Ct. at 2421 (Thomas, J., concurring in the judgment in part and dissenting in part).
\item \textsuperscript{102} Id. at 2421-22.
\item \textsuperscript{103} Id. at 2424.
\item \textsuperscript{104} Id. at 2423. Justice Thomas suggested, indeed, that such requirements are unconstitutional. Id. at 2423 n.6. In Time Warner Entertainment Co. v. FCC, 93 F.3d 957 (D.C. Cir. 1996), the D.C. Circuit rejected constitutional attacks on the 1992 Act’s requirement that cable operators carry leased-access channels, and on its endorsement of local franchising authorities’ authority to require public-access channels. In discussing leased-access channels, the court reasoned that the requirement is content-neutral, and serves important government interests in “promoting the widespread dissemination of information from a multiplicity of sources” and “promoting fair competition in the market for television programming.” Id. at 969 (quoting Turner Broadcasting Sys. v. FCC, 114 S.Ct. 2445, 2469-70 (1994)). It is narrowly tailored to serve those interests because it requires cable operators to allocate channels for leased access only to the extent that leased-access programmers in fact use them (and only up to the 10-15% maximum set out in the statute). As for public-access channels, the court noted that different franchising authorities could impose widely varying public-access requirements; it ruled that plaintiff’s facial challenge could succeed only if no public-access requirement could be constitutional. The court was confident, though, that a requirement that a cable operator provide a single channel for public use, open to everyone on a nondiscriminatory basis, would not violate the First Amendment. Such a requirement would be content neutral, would serve an important purpose (promoting “public access to a multiplicity of information sources”) unrelated to the suppression of free expression, and would be narrowly tailored to serve that goal. Id. at 973 (quoting Turner, 114 S.Ct. at 2470).
\end{itemize}
constitutional rights on programmers’ behalf, but had not done so across the board.\footnote{105}

**B. THE DISAPPEARANCE OF STATE ACTION ANALYSIS?**

It is striking that the three Justices expended so little ink on state action analysis. That, after all, was the topic that had bedeviled the lower-court judges, and has presented the Supreme Court with some of its most knotty problems. Yet none of the Justices thought it worth more than a paragraph’s discussion. The issue, though, could not be disposed of so easily. Each of the Justices incorporated the missing state action concerns, on an implicit level, into his First Amendment analysis. To show this, I will return to the opinions in reverse order — first Justice Thomas’s, then Justice Kennedy’s, and finally Justice Breyer’s.

1. **Justice Thomas**

Justice Thomas’s dissenting opinion came closest to the analysis of the D.C. Circuit en banc. The opinion never referred to “state action,” but its central themes touched directly on state action concerns. It relied at its core on the bedrock understanding that a cable operator’s refusal to carry programming is not a governmentally-imposed burden on speech, because cable operators are not government; rather, they are private, autonomous speakers. Justice Thomas asked skeptically how “a programmer’s ordinarily unprotected interest in affirmative transmission of its programming acquires constitutional significance in leased and public access channels,” but his own opinion answered the question: the interest can “acquire constitutional significance” if it is burdened by the government in a content-based manner.\footnote{106} The programmer’s interest had no constitutional significance for Thomas because, he took for granted, carriage decision by private cable operators did not implicate government action.

Justice Thomas’s discussion drew on basic concerns of individual autonomy that underlie state action doctrine. Whenever a court applies constitutional constraints to an action that on its face looks like private action, it invades the autonomy of the actor in the name of the Constitution. This is at least somewhat anomalous, for standard doctrine teaches

\footnote{105. Justice Thomas, finally, argued that § 10(b) of the 1992 amendments (the segregate-and-block requirement) was constitutional, because narrowly tailored to achieve the government’s compelling interest in protecting minors from the influence of indecent speech. 116 S.Ct. at 2428-32.}{106. “If Congress had forbidden cable operators to carry indecent programming on leased and public access channels, that law would have burdened the programmers’ right . . . to compete for space on an operator’s system. The Court would undoubtedly strictly scrutinize such a law.” Id. at 2424.}
that the Constitution places no constraint on private action. We justify it on the ground that the assertedly private action was not autonomous at all, that it is in some meaningful sense "really" government action. But if the action in question is not only assertedly private but also constitutionally protected, then a finding of state action threatens to render the constitutional doctrine incoherent. In Columbia Broadcasting System v. Democratic National Committee, for example, respondents challenged broadcasters' refusal to accept certain political advertisements, and the FCC's refusal to insist that broadcasters run the advertisements. A divided Court rejected the claim. To view First Amendment speakers as state actors violating the First Amendment, Chief Justice Burger answered for a plurality, "would be a contradiction."

In Denver Area, so long as Justice Thomas maintained the focus on cable operators as the asserted bad actors, he made it impossible for programmers to articulate a coherent constitutional claim. Cable operators are not the government, and it seems problematic that their decisions regarding what programming to carry — decisions at least presumptively protected by the First Amendment — in fact amount to state action violating it. This approach to state action analysis, on the other hand, has its limitations. The state action discussion in Columbia Broadcasting System v. Democratic National Committee, focusing on the question whether broadcasters were themselves "state actors," may have obscured the more profound constitutional question in that case — whether the First Amendment's zealous protection of the marketplace of ideas required the FCC (itself surely a state actor) to ensure that broadcasters carried political ads. Similarly here, Justice Thomas' emphasis on cable operators, and their First Amendment rights, left in the shadows the question whether Congress' allocation of authority between programmer and cable operator was unconstitutional because non-neutral as to content.

107. "[T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may fairly be treated as that of the State itself." Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974).
109. Id. at 120-21 (opinion of Burger, C.J.).
111. Justice Thomas made additional arguments: first, that the 1992 amendments cannot violate the First Amendment because Congress designed them to empower cable operators to use their own property to speak; second, that the indecency restrictions should be viewed as part of the larger set of statutory provisions creating the access right. Since that set of provisions, viewed as a whole, expanded programmers' ability to speak, programmers again had no occasion for First Amendment challenge. 116 S. Ct. at 2424-25. Both of these positions, though, flowed from his foundational stress on cable operators as the central actors in the First Amendment drama; he viewed Congress' non-neutrality as
2. Justice Kennedy

The interplay of state action considerations in Justice Kennedy's opinion is a bit more elaborate. Justice Kennedy purported to dispose of the state action question at the start; he pronounced that the 1992 amendments constitute state action because they "alter legal relations between persons." That quick answer, though, seems less than entirely satisfying. For one thing, it seems inconsistent with *Flagg Brothers, Inc. v. Brooks*,[112] in which the Court found no state action in an analogous challenge to action taken pursuant to a statute that altered legal relations between persons. More importantly, as Justice Breyer recognized, while "state action" is obvious in the enactment of any statute, one must still face the question in this case whether it is Congress, rather than the cable system operators, who should be held responsible for any diminution in access programmers' ability to speak.[113] If responsibility lies with the cable operators, then it is hard to escape the conclusion that there is no relevant state action.

To understand Justice Kennedy's response, it's useful to consider an argument made in a *Denver Area* amicus brief. The Family Research Council urged that the 1992 amendments were subject to no searching government scrutiny because they merely allocated programmers a government subsidy — a government-created right to use somebody else's property for their speech.[114] It is well-settled that government is subject to no more than minimal First Amendment scrutiny, as a general matter, when it subsidizes speech along content-based lines. In *Regan v. Taxation with Representation*,[115] for example, the Court held unanimously that Congress may distribute funds to subsidize speech as "a matter of policy and discretion not open to judicial review," at least so long it does not intend "the suppression of dangerous ideas."[116]

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112. 436 U.S. 149 (1978). In *Flagg Brothers*, the Court rejected a due process challenge to actions taken pursuant to a UCC provision allowing warehouse owners to sell bailed goods in order to recover unpaid storage charges. In that case as in *Denver Area*, a statute altered legal relations between persons by authorizing private action that would not otherwise have been legal.

113. See supra text accompanying note 66.


116. Id. at 548-49 (quoting Cincinnati Soap Co. v. United States, 310 U.S. 308, 317 (1937), and Cammarano v. United States, 358 U.S. 498, 513 (1959)). In Board of Education, Island Trees School District v. Pico, 457 U.S. 853 (1982), while a divided Court concluded that public school authorities may not remove books from school libraries on the basis of viewpoint, the Justices did not begin to suggest that any First Amendment limitations governed the acquisition of books.
v. Sullivan,117 the Court explained that government's freedom to grant
differential subsidies for speech is so broad that the state may even
forbid the recipients of government largesse, in the context of a
government-funded project, to express disfavored ideas (in that case, that
abortion was an appropriate method of family planning).

This subsidy argument reformulated the D.C. Circuit's state action
concerns. The essence of the constitutional claim in a typical subsidy case
is that the government has merely declined to fund plaintiff's speech.
The Court ruled in Taxation with Representation that such a decision
generally does not trigger constitutional scrutiny, for "although
government may not place obstacles in the path of a person's exercise of
freedom of speech, it need not remove those not of its own creation."118
Put another way, the government has not "acted" at all vis-a-vis such a
plaintiff, and the Constitution gives him no basis to challenge state
inaction. The relevance of the argument to Denver Area is plain:
notwithstanding that government drew content-based lines in granting
some speakers, but not others, a right of access to cable channels,
plaintiffs must come up short if that right of access is a mere subsidy, in
the Taxation with Representation sense, that Congress has power to
grant or deny. As the D.C. Circuit put it, "[w]hatever may be said in
support of indecent programming on access channels, Congress surely
does not have to promote it."119 Justice Thomas drew on this point in
arguing that "government intervention that grants access programmers
an opportunity to speak that they would not otherwise enjoy . . . cannot
be an infringement of the same programmers' First Amendment rights,
even if the new speaking opportunity is content-based."120

Justice Kennedy's answer lay in his contention that public-access and
leased-access channels are public forums, or their functional equivalents.
That categorical move necessarily trumped the subsidy argument: "[T]he
existence of a Government 'subsidy,' in the form of Government-owned
property, does not justify the restriction of speech in areas that have
'been traditionally open to the public for expressive activity,' or have
been 'expressly dedicated to speech activity.'"121 Rosenberger v. Rector
of University of Virginia122 illustrates that point. In Rosenberger,
plaintiffs had challenged a state university's refusal to provide student
activities funding, of the sort received by many student publications, to

118. 461 U.S. at 549-50 (quoting Harris v. McRae, 448 U.S. 297, 316 (1980) (Justice
Rehnquist's ellipsis and brackets omitted)).
119. Alliance for Community Media v. FCC, 56 F.3d 105, 118 (D.C.Cir. 1995), aff'd in
part & rev'd in part sub nom. Denver Area Educ. Telecommunications Consortium v. FCC,
120. 116 S.Ct. at 2424.
121. Rust, 500 U.S. at 199-200.
their Christian magazine. The university, citing Rust and Taxation with Representation, answered that it could draw such distinctions in determining which speech to subsidize.\textsuperscript{123} The Court disagreed. To be sure, "we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message."\textsuperscript{124} But the matter is different when government has created a limited public forum\textsuperscript{125} — when the point of the government subsidy is to "encourage a diversity of views from private speakers."\textsuperscript{126} In that context, denial of a subsidy on speech-based grounds is no more than censorship.

The finding of a public forum overcomes state action concerns because it transforms our perception of the government action. In the absence of a public forum or something functionally similar, government can plausibly argue that it is not "acting" when it fails to give a would-be speaker access to a public resource; it is merely declining to give him affirmative assistance. Where government has established a public forum or otherwise acted to ensure public access to a communications resource, on the other hand, it is hard to view its singling out of particular would-be speakers as anything other than a constitutionally cognizable exclusion.\textsuperscript{127}

3. Justice Breyer

Justice Breyer, too, broached the state action issue at the start of his opinion. The real issue, he said, was not whether an Act of Congress was state action. The question, rather, was whether the 1992 amendments "restrict[] speech." This language incorporates a worthwhile insight. In many cases that raise "state action" concerns, it is unhelpful to center one's analysis on the presence or absence of state action as such; one can

\textsuperscript{123} Defendant also argued that its grant of funding to the Christian magazine would amount to an unconstitutional establishment of religion. See id. at 2521-25.

\textsuperscript{124} Id. at 2518.

\textsuperscript{125} Id. at 2516-17.

\textsuperscript{126} Id. at 2519.

\textsuperscript{127} This issue of characterization keeps popping up in the differences between Justices Breyer and Kennedy in this case. Justice Breyer muses that government might well be able "to dedicate a public forum to one type of content," without subjecting itself to strict scrutiny. "Must a local government, for example, 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)? The answer is not obvious." 116 S.Ct. at 2389. Justice Kennedy answers that the analogy is not apposite — "[o]ur case is more akin to the Government's creation of a band shell in which all types of music might be performed except for rap music." Id. at 2414. Cf. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (municipal board acted unconstitutionally in denying application to present the musical "Hair" at city-leased theatre); Louis Michael Seidman, The State Action Doctrine, 10 CONST. COMM. 379, 394 (1993) (making a nice analogous point about the importance of characterization in the "takings" context).
find some state action (if only the decision to tolerate private acts threatening constitutional values) in just about any case. Often it is more useful to ask whether the government choice is unconstitutional as a matter of substantive constitutional law. In Shelley v. Kraemer, the puzzle case of modern state action law, for example, the presence of "state action" was hardly controversial: how else could one characterize a judicial order backed by the coercive power of the state of Missouri? The difficult question was whether the state court's policy of enforcing restrictive covenants was unconstitutional.

As Justice Breyer recognized, though, this insight does not make state action issues disappear; it simply moves them into a (perhaps) more manageable forum. The plurality opinion now had the responsibility of answering the question whether the 1992 amendments "restrict[] speech." Respondents had taken the position that the statutes did not — and could not — themselves restrict speech, because they were merely permissive; any restriction of speech had to be laid at the feet of the private, autonomous, cable system operators. The plurality, though, did not speak to this question. Instead, it leapt right into the question whether the statutory provisions "properly address[] an extremely important problem, without imposing, in light of the relevant interests, an unnecessarily great restriction on speech." It held the public-access provision unconstitutional without ever returning to its state action discussion.

Can this be? Did the plurality simply ignore the state action issue, resolving it neither explicitly nor implicitly? Not, I think, exactly. State action considerations did reappear in the plurality's analysis. In calculating the "complex balance of interests" surrounding the leased-

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129. 334 U.S. 1 (1948). The Supreme Court in this case reversed, as inconsistent with the Equal Protection Clause, a state court order enforcing a restrictive covenant that forbade sale of the burdened land to African-Americans. The decision "is widely regarded as one of the most controversial and problematic decisions in all of constitutional law." GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1617 (2d ed. 1991).

130. Chief Justice Vinson's opinion in Shelley is unsatisfying in part because it expends a great many words proving that a state-court order is "state action," and very few on the proposition that Missouri's undoubted action was unconstitutional. For efforts to supply the latter, see, e.g., Louis Henkin, Shelley v. Kraemer: Notes for a Revised Opinion, 110 U. PA. L. REV. 473 (1962); Tribe, supra note 110, at 260.

131. Shelley illustrates the point. Asking whether the state court's willingness to enforce the restrictive covenant amounted to an equal protection violation is the first step in the constitutional analysis, but hardly the last; courts' ability uncontroversially to enforce at least some background legal rules is what makes the public-private distinction (and hence state action doctrine) possible. See Seidman, supra note 127, at 392-93.

132. See supra text accompanying note 72.
access and public-access provisions, the plurality noted that the provisions were permissive, and that the access requirements involved a balance between the First Amendment interests of access programmers and cable operators. Its bottom line on § 10(a): 133

The existence of this complex balance of interests persuades us that the permissive nature of the provision, coupled with its viewpoint-neutral application, is a constitutionally permissible way to protect children from the type of sexual material that concerned Congress, while accommodating both the First Amendment interests served by the access requirements and those served in restoring to cable operators a degree of the editorial control that Congress removed in 1984. 134

The plurality, I think, considered both state action issues and the First Amendment considerations in a single overarching balancing process. That was how the plurality determined whether the provisions “restrict[ed] speech.”

Good or bad, this is unprecedented. Such an approach was urged by academics in the 1960s and 70s, 135 but I am aware of no other Supreme Court decision adopting it. What explains this sudden shift in methodology? I will attempt to answer that question in Part III. First, though, I will identify a second, related mystery in Justice Breyer’s opinion.

C. CATEGORIZATION AND BALANCING

Both Justice Kennedy’s and Justice Thomas’s opinions relied heavily on categorization and rules. That seems appropriate; as Kennedy put it, “the central achievement of our First Amendment jurisprudence” is judicial adherence to stringent, abstract First Amendment rules. Those rules “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.” 136 The plurality opinion, on the other hand, explicitly rejected any reliance on “categorical” doctrine such as public forum law; instead, it stressed “contextual” assessment.

The public forum rules, according to Justice Breyer, were inapposite because they were “developed in very different contexts,” and lack “flexibility.” 137 This is not a satisfying explanation. It is true that public-forum doctrine, like First Amendment doctrine in general, is abstract rather than particularistic, applying across a wide range of fact-

133. The 1992 Act § 10(a) at 1486 (codified at 47 U.S.C. § 532(h)).
135. See Glennon & Nowak, supra note 128; Henkin, supra note 130; see also Van Alstyne, supra note 128.
136. 116 S.Ct. at 2406; see also Schauer, supra note 65.
137. 116 S.Ct. at 2384.
situations. It is true, moreover, that it relies on categorization rather than balancing. Rather than sensitively weighing the competing considerations arising out of the particular facts of a speaker’s wishing access to government resources, a court applying the doctrine must crudely pigeonhole the case before it into the obtuse categories of public forum, limited public forum, and nonpublic forum; the result follows automatically from there.\(^3\) But that problem, if problem it be, arises every time a court applies public forum doctrine; it supplies no excuse for relying on the doctrine most of the time but departing from it in this particular instance. Indeed, the abstraction of public-forum law has been hailed as one of its strengths, “prevent[ing] the free speech decision maker from ‘thinking small.”\(^3\)9

More strikingly, the tone of the plurality opinion seems to bespeak a rejection of legal doctrine in general. The theme of the opinion seems to be something like this: “Justices Kennedy and Thomas present doctrinal arguments; we, on the other hand, think that following doctrine might lead us astray. As a result, we’re going to rely on contextual, situationally sensitive decision making — that is, following our guts.” Late in its discussion of the leased-access provision, the plurality explained how the precedential force of *Pacifica*, together with the plurality’s other reasoning, overcame Justice Kennedy’s public-forum argument. The plurality, though, does not really seem to have been following the standard maneuver of declining to decide a doctrinal issue because some other doctrinal issue takes the first one out of the case (as where the Court declines to decide whether rational-basis analysis or strict scrutiny applies, because the statute at issue fails either test).\(^4\) Rather, in important respects, the plurality seems to have been saying that it would be unwise to decide the case on the basis of categorical, inflexible, abstract legal doctrine at all. It is not often one sees a Supreme Court plurality apparently disowning the idea — commonly referred to as the Rule of Law — that courts decide cases according to doctrinal commands.\(^4\)

One might respond here that the plurality did not reject the Rule of Law at all; rather, it rejected only the law of rules.\(^4\) Balancing, after all, is a legitimate mode of constitutional analysis. For example, in


\(^{139}\) Schauer, supra note 65, at 408.


\(^{141}\) “[O]urs is a government of laws, not of men, and... we submit ourselves to rulers only if under rules.” Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 646 (1952) (Jackson, J., concurring); see Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1 (1959); Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. CHI. L. REV. 1175 (1989).

\(^{142}\) See supra notes 62-63 and accompanying text. I owe the wordplay to Scalia, supra note 141.
interpreting the due process clause, though Justice Scalia advocates the rule-like answer that that due process protects only those practices, defined at the most specific level, that were protected against government interference when the Fourteenth Amendment was ratified, a majority of today's Court adheres to the balancing approach of Justice Harlan:

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society.

In both the state action and First Amendment contexts, one might argue, the plurality simply adopted a contextual, balancing approach rather than a categorical one.

There surely were arguments favoring balancing in Denver Area. Because balancing focuses on the facts of each particular case, the outcome of a balancing analysis will not have sweeping, unexamined, precedential value; balancing is thus consistent with incrementalism and humility, which surely have their place in constitutional law. Some have argued that balancing is most appropriate, and rules least, where our learning and confidence are most lacking; this finds a reflection in Justice Breyer's concern that it would be "premature" to freeze constitutional analysis of cable TV given "the changes taking place in the law, the technology, and the industrial structure, related to telecommunications." 

In the state action area, some scholars in the 1960s and 70s urged that courts resolve state action questions through explicit balancing; 1960s Supreme Court cases contain language to the same effect.

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146. See Charles P. Curtis, A Better Theory of Legal Interpretation, 3 Vand. L. Rev. 407, 424 (1950) (a legal directive "should be as flexible, as elastic, indeed as vague, as the future is uncertain and unpredictable"); see also Schlag, supra note 62, at 424-26 (finding the formulation unsatisfactory).
147. 116 S.Ct. at 2385; see also id. at 2401-03 (Souter, J., concurring).
148. See sources cited supra note 133.
149. See Reitman v. Mulkey, 387 U.S. 369, 378 (1967); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). Burton explains that one cannot devise an abstract "formula" for the presence of state action; courts can reach conclusions only contextually, "by sifting facts and weighing circumstances." 365 U.S. at 722. "This differs from Justice Stewart's famous 'I know it when I see it' standard for judging obscenity mainly in the
While core First Amendment philosophy requires that the law actually regulating citizens' speech be cast in the form of rules (for example, a statute providing that "citizens will be liable in damages for defamatory statements if and only if the damage they do to the social fabric outweighs the value of their speech in promoting public discourse" would be unconstitutionally vague), courts have often engaged in balancing to accomplish First Amendment analysis: to determine whether a regulation goes too far in suppressing speech, or what sort of speech is worthy of what level of protection. Indeed, the courts have found strict categorization simply unworkable in certain First Amendment areas; witness Judge Leventhal's intrepid but doomed attempt to systematize obscenity law, in 1972, by categorizing the Supreme Court's case law on the basis of body parts revealed, sexual positions, numbers of participants, and so on.

This answer, though, seems completely insufficient in this case. For starters, the Court in recent decades has moved ever farther from balancing, and towards rules, in both state action and First Amendment analysis. More fundamentally, an affection for balancing is simply insufficient to explain the Denver Area plurality opinion. The plurality wasn't embracing balancing on a blank slate; First Amendment law is already out there, and incorporates a lot of rules. The plurality opinion, declining to pay attention to those rules, challenges the comparative precision of the latter. Paul Brest, State Action and Liberal Theory: A Casenote on Flagg Brothers v. Brooks, 130 U. Pa. L. Rev. 1296, 1325 (1982).

150. See Weinberg, supra note 62, at 1169 n.318.


153. I should explain myself here, since others more august than I have suggested just the opposite. See, e.g., T. Alexander Aleinikoff, Constitutional Law in the Age of Balancing, 96 Yale L.J. 943, 967-68 (1987). Kathleen Sullivan notes that First Amendment analysis importantly relies on balancing in its mid-level, mixed-outcome treatment of content-neutral regulation. See Sullivan, Post-Liberal Judging, supra note 62, at 297. The Court, though, has moved far from the ad hoc balancing apparent in cases such as Schneider v. State, 308 U.S. 147 (1939). In that case, the Court really did seem to weigh the state interests served by a leafletting ban against the damage that ban did to free speech. In most modern cases (such as Ward v. Rock Against Racism, 491 U.S. 781 (1989)), by contrast, there is no room for a judgment that a regulation should be upheld because the burdened speech is of slight importance, or struck down because the burdened speech is central to public discourse. Courts are directed to inquire whether the regulation advances a "substantial" state interest; whether it burdens "substantially more speech than is necessary" to further that interest; and whether it forecloses alternative channels of communication. Id. at 791, 798-800. Granted, this is mid-level inquiry, and the test may allow for some covert consideration of the value of the speech. See, e.g., City of Ladue v. Gilleo, 114 S.Ct. 2038 (1994). But there is no weighing of "competing rights and interests on a scale," Sullivan, supra, at 293-94; the court's reasoning process is better described as last-minute categorization.
conventional understanding that judges decide cases by applying doctrine
enunciated in prior cases, not by balancing any factor that comes to
hand. As Justice Kennedy put it, “formulations like strict scrutiny, used . . . to ensure that the inequities of the moment are subordinated to
commitments made for the long run, mean little if they can be watered
down whenever they seem too strong. They mean still less if they can be
ignored altogether . . . .”154

III. THE PUZZLING PERSISTENCE OF PACIFICA

An answer — or at least an antecedent — for both these mysteries can
be found in Justice Breyer's heavy reliance on Pacifica. It is Pacifica, in
the end, that dominates the Denver Area plurality's doctrinal reasoning,
and it offers the key to that opinion.

In Pacifica too, the Justices followed a situationally sensitive approach
to First Amendment analysis. Both of the opinions supporting the
judgment — Justice Stevens's plurality and Justice Powell's concurrence —
rely strikingly on contextualization, balancing and a rejection of
abstract doctrine. Recall the facts of the case: WBAI-FM in New York, on
a Tuesday afternoon, broadcast a twelve-minute monologue in which the
comic and social critic George Carlin repeatedly used certain four-letter
words (including the word “shit” or variants more than seventy times,
and the word “fuck” or variants more than thirty times).155 The FCC
concluded that the station had violated 18 U.S.C. § 1464’s prohibition on
the broadcast of “obscene, indecent and profane language.” It reasoned
that the concept of “indecency,” in this context, was intimately connected
with the broadcast of “language that describes, in terms patently
offensive as measured by contemporary community standards for the
broadcast medium, sexual or excretory activities or organs, at times of
day when there is a reasonable risk that children may be in the
audience,” and ruled that the WBAI broadcast violated that stan-
dard.156

Pacifica (WBAI’s owner) conceded that the broadcast was “offensive”
and “shocking.”157 It argued, however, that the FCC’s standard would
burden large amounts of protected speech and was thus overbroad;
morover, it claimed, the Carlin monologue was itself constitutionally
protected. The Supreme Court refused to address the overbreadth claim.
Justice Stevens, speaking for the Court, reasoned that the FCC’s action
was an adjudication limited to a “specific factual context.”158 The Court,
he argued, should similarly limit its focus; after all, it reviewed "judgments, not . . . opinions."\textsuperscript{159}

This analysis is problematic. It mischaracterized the FCC's action, and moreover seems logically unsound as a device for avoiding conventional overbreadth doctrine. In adjudication as well as in rulemaking, broad statements by the regulator can have a chilling effect on speakers not before the court; it is that chilling effect that justifies overbreadth analysis.\textsuperscript{160} Perhaps recognizing these difficulties, Justice Stevens offered other justifications, in the portion of his opinion signed only by himself, Chief Justice Burger and Justice Rehnquist, for limiting review to "the question whether the Commission has authority to proscribe this particular broadcast." Such narrowly tailored review, he said, was appropriate because "indecency is largely a function of context — it cannot be adequately judged in the abstract."\textsuperscript{161} In any event, he continued, even if the FCC's standard were overbroad, it could chill only low-value speech "at the periphery of First Amendment concern."\textsuperscript{162} Justice Powell, for his part, suggested that it was appropriate for the Court to limit its review to the particular facts before it because "the Commission may be expected to proceed cautiously, as it has in the past."\textsuperscript{163}

Having confined their focus to the contextual, fact-specific examination of the Commission's "authority to proscribe this particular broadcast," Justices Stevens and Powell turned to the merits of the constitutional claim. It was not obvious that the Government should prevail. The Solicitor General asserted interests in protecting unwitting listeners and children from offensive speech. Cohen \textit{v. California},\textsuperscript{164} though, had denied government authority to cleanse public speech of four-letter words, except when necessary to prevent "essentially intolerable" invasions of the privacy of captive auditors,\textsuperscript{165} and Erznoznick \textit{v. City of Jacksonville}\textsuperscript{166} had cautioned that "[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be

\textsuperscript{159} Id. \textit{quoting} Black \textit{v. Cutter Lab.}, 351 U.S. 292, 297 (1956)).
\textsuperscript{160} See Weinberg, \textit{supra} note 86, at 241-42.
\textsuperscript{161} 438 U.S. at 742 (plurality opinion).
\textsuperscript{162} Id. at 743. Four Justices explicitly rejected that position in \textit{Pacifica}. \textit{See id. at 761
& n.4} (Powell, J., joined by Blackmun, J., concurring in part and concurring in the judgment); \textit{id. at 672-63} (Brennan, J., joined by Marshall, J., dissenting). Justices Stewart and White did not address the question; Justice Stewart, however, had rejected a similar argument two years earlier. \textit{See Young \textit{v. American Mini-Theatres}}, 427 U.S. 50, 85-88 (1976) (Stewart, J., dissenting). A majority of the Court, thus, was on record as rejecting this rationale.

\textsuperscript{163} 438 U.S. at 761 n.4 (Powell, J., joined by Blackmun, J., concurring in part and concurring in the judgment).
\textsuperscript{164} 403 U.S. 15 (1971).
\textsuperscript{165} Id. at 21.
\textsuperscript{166} 422 U.S. 205 (1975).
suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.\textsuperscript{167}

Justice Stevens answered these objections by contextualizing and balancing: by emphasizing that proper resolution of an indecency case must look to its particular facts, for "[i]t is a characteristic of speech such as this that both its capacity to offend and its 'social value' ... vary with the circumstances."\textsuperscript{168} Given the slight social value of Carlin's speech, the limited First Amendment protection given to broadcasting, broadcasting's "uniquely pervasive presence," its accessibility to children, and the time of day, the Commission's action was permissible.\textsuperscript{169} The opinion enunciated no overarching rule of law, and relied little on abstract rules found in earlier cases; on the contrary, Stevens proceeded contextually and incrementally, in a situation in which he found no abstract rule appropriate. Justice Powell's opinion took essentially the same approach.\textsuperscript{170}

With this understanding of \textit{Pacifica}, the \textit{Denver Area} case makes more sense. It's apparent on the face of the opinion that the plurality followed \textit{Pacifica} doctrinally. It should be clear by now that the plurality followed \textit{Pacifica} jurisprudentially as well. Rejecting abstract doctrine and hard-edged rules in favor of an ad hoc, contextual weighing of the policy considerations presented by the case's particular facts, Justice Breyer reproduced the balancing approach of \textit{Pacifica}, eighteen years earlier. \textit{Pacifica} provides a model for the plurality's First Amendment analysis, in which Breyer evaluated the "complex balance of interests" the case presents, seeking to vindicate the "essence" of First Amendment jurisprudence rather than actual First Amendment rules.\textsuperscript{171}

Indeed, \textit{Pacifica} helps explain the plurality's state action analysis as well. That analysis makes sense only if we see the plurality as simply dumping the considerations underlying the state action dilemma into its overall First Amendment balancing. Such an approach is inconsistent with modern state action doctrine because that doctrine is essentially rule-bound, and spurns ad hoc balancing.\textsuperscript{172} But it is wholly consistent with the devotion to balancing that the plurality inherited from \textit{Pacifica}.

This answer, though, generates another question. Justice Breyer's adoption of \textit{Pacifica}'s approach to constitutional analysis is in many ways the most curious thing about the \textit{Denver Area} decision. \textit{Pacifica}, after all, "has been described as possibly the worst of all of the Supreme

\begin{itemize}
\item[167.] \textit{Id.} at 213-14.
\item[168.] 438 U.S. at 747 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).
\item[169.] 438 U.S. at 748-50.
\item[170.] \textit{See id.} at 755-62.
\item[171.] \textit{See supra} text accompanying notes 76-88.
\item[172.] \textit{See supra} note 150 and accompanying text.
\end{itemize}
Court First Amendment decisions." After *Pacifica* was decided, courts and FCC quickly reinterpreted it in a more conventional, doctrinally grounded manner. The D.C. Circuit ruled that an FCC restriction on broadcast indecency could be sustained only if it were precisely drawn to serve the government's compelling interests in protecting unsupervised children. The Supreme Court appeared to endorse this approach in *Sable Communications, Inc. v. FCC*, in which it applied strict scrutiny to a prohibition on "indecent" telephone sex recordings, and found the statute wanting because insufficiently narrowly drawn. Both FCC and D.C. Circuit, after *Sable*, repeatedly treated *Pacifica* as if it had been decided quite differently, so that the government's content-based restriction on broadcast indecency could stand only if it were necessary to achieving a compelling government interest. The D.C. Circuit repeatedly struck down, as inconsistent with the First Amendment, attempts to codify *Pacifica* for general application. The Supreme Court, for its part, rejected attempts to extend *Pacifica*'s reasoning from the special case of over-the-air broadcast into other areas.

In short, although *Pacifica*'s holding remained good law, there seemed to be nothing left of its foundational assumption that courts could address restrictions on indecency through ad hoc, situationally sensitive

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174. *Action for Children's Television v. FCC*, 852 F.2d 1332, 1343 n.18 (D.C. Cir. 1988). This opinion was written by then-Judge (now Justice) Ginsburg. Justice Ginsburg did not join the plurality opinion in *Denver Area*, instead joining Justice Kennedy's sharp dissent.


176. *Id.* at 126-31.


analysis, without being troubled too much by abstract doctrine (such as the requirement of strict scrutiny of content-based regulation). Yet that is precisely the aspect of *Pacifica* that the *Denver Area* plurality revived, and transformed into a model for the regulation of cable television. It’s hardly obvious that the *Denver Area* plurality should have returned to *Pacifica’s* contextual style. The move is especially questionable given the Court’s statement two years earlier that “the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation . . . does not apply in the context of cable regulation.”

What are the factors that made *Denver Area* like (or motivated the Justices to treat it like) *Pacifica*? In attempting to answer that question, it’s worth noting the inherent intractability of government regulation of indecent speech. Back in 1975, when the *Pacifica* case first came before the FCC, Commissioner Robinson confessed his difficulties.

> On reading George Carlin’s monologue, my first instinct was to affirm his opinion that these were indeed words “you couldn’t say on the public . . . airwaves.” Reflection pushed me to the opposite extreme: proper respect for the principles of free speech and of non-interference by government in matters of public decency and decorum commands us to [rule for] Pacifica. On still further reflection, I am led to conclude . . . that even a rigorous respect for the principles of free speech and government non-intervention permits some accommodation for the demands of decency.

While adopting the Commission’s “nuisance” rationale for regulation of indecency, Robinson recognized that “the logic of this ‘nuisance’ test” . . . would support a wholly unacceptable censorship role for the FCC as guardian of the public morals. The arguments for free speech and for regulation, he found, each carried with them internal logic denying any role for the other: “[T]here is no logical ground for compromise between the right of free speech and the right to have public utterance limited” in the interest of decorum. The conflicting claims cannot logically be compromised or reconciled; they can only “be made to coexist by tour de force.”

Robert Post has provided theoretical foundation for this point. In order to protect public discourse, he explains, the Court prohibits legal

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183. *Id.* at 108.
184. *Id.* at 110.
institutions from penalizing speech that violates community norms of propriety and decency. America, after all, contains many diverse communities; the alternative would privilege certain communities through the legal system, and repress others.\textsuperscript{185} Suspending community norms in that manner, though, is deeply problematic, since it is those norms of civility and decency that make reasoned, noncoercive discourse possible.\textsuperscript{187} There can be no coherent accommodation of these competing claims when it comes to regulation of indecency; there can only be ideologically-based line-drawing.\textsuperscript{188}

I have suggested elsewhere that it was natural for \textit{Pacifica} to adopt a balancing approach to broadcast indecency, and to announce a boundary that allowed the government law-enforcer to make ad hoc, contextualized enforcement decisions, because such an approach is characteristic of our broadcast regulatory system on a fairly deep level.\textsuperscript{189} I won't reprise those arguments here. Rather, given that \textit{Pacifica} did adopt such an approach, I'll just try to address the question why that reasoning bled over into \textit{Denver Area}.

\textit{Denver Area} was not a broadcasting case, but it had much in common with \textit{Pacifica} nonetheless. Here as in \textit{Pacifica}, the plurality Justices saw the FCC as attempting to enforce a commonsense, compromise solution to a vexing problem. Here as in \textit{Pacifica}, the Justices confronted a gut feeling that abstract doctrine pointed away from the commonsense result. And while cable television does not share the technological characteristics of over-the-air broadcast, and is not governed by the same set of legal rules, it \textit{felt} like broadcasting to the Justices. Its cultural characteristics were the same.

Justice Breyer, in \textit{Denver Area}, characterized \textit{Pacifica} as basing its holding on broadcasting's "uniquely pervasive" nature, its confrontation of the citizen in the home without warning, and its unique accessibility to children.\textsuperscript{190} The first two of these concerns, while highlighted in \textit{Pacifica}, had played virtually no role in post-\textit{Pacifica} indecency law until revived in the \textit{Denver Area} opinion.\textsuperscript{191} Justice Breyer reinvigorated

\begin{itemize}
\item \textsuperscript{186} See id. at 627-33.
\item \textsuperscript{187} See id. at 633-44.
\item \textsuperscript{188} See id. at 683.
\item \textsuperscript{189} See Weinberg, supra note 86, at 245-57.
\item \textsuperscript{190} 116 S.Ct. at 2386.
\item \textsuperscript{191} See, e.g., Infinity Broadcasting Corp., 3 F.C.C.Rcd. 930, 931 (1987) ("our authority \ldots is limited to the imposition of reasonable time, place and manner restrictions on the broadcast of indecent material in order to advance the government's interest in protecting children and in enabling parents to determine when and how their children are to be exposed to this material"), aff'd in relevant part, Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988); see also Action for Children's Television v. FCC, 58 F.3d 654 (D.C. Cir. 1995), cert. denied, 116 S. Ct. 701 (1996). The pervasiveness and intrusion rationales were the
Cable television programming is accessible to children, and, like over-the-air TV, has established "a uniquely pervasive presence in the lives of all Americans." Breyer noted that 63% of American homes subscribe to cable (not "all Americans," surely, but a lot of them) and proffers the dubiously useful statistic that households with cable watch more television than households without. Cable viewers, he found, are more "susceptible to random exposure to unwanted materials," because they are more likely to channel-surf before settling on a program. In sum, he concluded, *Pacifica* is "remarkably" apposite to cable TV regulation.

In a part of his *Pacifica* opinion joined by a majority of the Court, Justice Stevens had urged that "each medium of expression presents special First Amendment problems," and that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection." This was a dramatic extension of prior law. Previously, broadcasting's "special" status had been thought to flow from spectrum scarcity; but no member of the Court in *Pacifica* thought that scarcity issues supported the result in that case. As Justice Brennan noted in dissent, "although scarcity has justified increasing the diversity of speakers and speech, it has never been held to justify censorship." After *Pacifica*, the Court once again described the special status of broadcasting as flowing entirely from spectrum scarcity issues. Because those issues had no direct parallel in the regulation of cable TV, the Court announced, "application 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."

Justice Breyer in *Denver Area*, though, explained that broadcast — and cable — are indeed special for reasons that have nothing to do with spectrum scarcity. Scarcity "has little to do with a case that involves the effects of television viewing on children. Those effects are the result of how parents and children view television programming, and how pervasive and intrusive that programming is. In that respect, cable and broadcast television differ little, if at all." *Pacifica* and its ad hoc subject of extensive academic criticism. See *e.g.*, LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 210-11 (1987).
approach to First Amendment analysis, in other words, rested on the cultural characteristics of television, not the technological ones.

The result: Pacifica's reasoning and jurisprudential approach are back. This is disturbing. The history of First Amendment decision making in this century suggests that rules are more effective than ad hoc analysis in protecting speech from the fears and repression of the moment. Justice Breyer, in the Denver Area plurality opinion, attributed his contextual approach to "the changes taking place in the law, the technology, and the industrial structure," which, he said, made any attempt to enunciate abstract doctrine premature. The deeper message of the plurality opinion, though, is that no matter how technology evolves, Pacifica's contextual approach — not the law of rules — will continue to guide content-based regulation of media that feel like television.

CONCLUSION

The plurality opinion in Denver Area emphasizes contextual, rather than rule-bound, analysis, and offers a unique balancing answer to a state action question. It makes sense when seen as a revival of Pacifica. That the Court has brought back Pacifica, doctrinally and jurisprudentially, is a bit of a shock: while Pacifica's holding has remained good law for the past eighteen years, the courts and FCC had given its reasoning up for dead. The plurality Justices, though, focused on the cultural and social similarities between cable and over-the-air television, and showed no discomfort with ad hoc balancing analysis in the First Amendment arena. The case suggests that contextual analysis will survive the demise of the scarcity doctrine in communications law; its attraction goes deeper than that.

200. The plurality's approach is not bad from the perspective of state action analysis; it may even be salutary. But it is disturbing from the perspective of First Amendment law.

201. 116 S.Ct. at 2385; see also id. at 2401-03 (Souter, J., concurring).