

EDWARDS, *Chief Judge*, dissenting in part: I agree with the judgment reached by the dissent—that sections 10(a) and 10(b), together, constitute state action and do not provide the least restrictive means to further the Government's asserted interest in promoting the well-being of children. According to the Government, children face harm from exposure to "indecent" programming on leased access cable television, so it is contended that Congress may lawfully act to ban such programming. There is not one iota of evidence in the record, however, to support the claim that exposure to indecency is harmful—indeed, the nature of the alleged "harm" is never explained. This being the case, there is little doubt in my mind that the statute as presently written fails constitutional scrutiny.

I write separately because I do not entirely agree with the analysis underlying Judge Wald's dissent. Frankly, I think that Congress may properly pass a law to facilitate *parental supervision of their children*, i.e., a law that simply segregates and blocks indecent programming and thereby helps parents control whether and to what extent their children are exposed to such programming. However, a law that effectively *bans* all indecent programming—as does the statute at issue in this case—does not facilitate parental supervision. In my view, my right as a parent has been preempted, not facilitated, if I am told that certain programming will be banned from my cable television. Congress cannot take away my right to decide what my children watch, absent some showing that my children are in fact at risk of harm from exposure to indecent programming. But Congress surely can, I think, act to help me implement the decisions that I make as a parent. However, this latter interest—facilitating parental supervision—has not been advanced by the Government in this case.

Because the foregoing propositions seem self-evident to me, I will refrain from an elaborate constitutional analysis of section 10's provisions. It is not so much the constitutionality of these provisions that I find perplexing, but rather the shortsightedness of Congress in enacting a scheme that does

so little to deal with the ills of television. At bottom, I think this case is much ado about nothing much.

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I agree with the majority that section 10(c) does not constitute state action and, therefore, does not pose any constitutional problems. Section 10(c) merely directs the FCC to allow cable operators to prohibit the use of their PEG-access channels for programming which contains obscenity, sexually explicit conduct, or material soliciting or promoting unlawful conduct. Cable operators' decisions to allow or prohibit such speech are their own; their action or inaction does not trigger any alternative regulatory regimes. In section 10(c), Congress merely returns some editorial control to cable operators, and this is not the least bit objectionable in my view.

Sections 10(a) and 10(b), however, constitute state action. These two provisions, read together, do not merely return some editorial control to cable operators, they tend to mandate a preferred result. Section 10(a) allows cable operators to ban indecent speech, and section 10(b) mandates that those cable operators who do not prohibit indecency must segregate and block the indecent programming. While the language of these two provisions contains a choice—indeed, the majority focuses on this “choice”—the choice is of little moment. Judge Wald's dissent is persuasive on this point.

If the statute did not contain section 10(b), I would agree with the majority that, section 10(a), itself, does not constitute state action, for the same reasons that section 10(c) is unobjectionable. Section 10(a), standing alone, merely directs the FCC to allow cable operators to prohibit indecent programming. But section 10(a) does not stand alone. Section 10(b) hinges on section 10(a): it speaks only to those who “have not voluntarily prohibited under subsection ([a])” and mandates that they segregate and block indecent programming.

In analyzing sections 10(a) and 10(b) separately, the majority effectively ducks the question of incentives. But I cannot comprehend how this issue can be avoided in any decision regarding the legality of the Act. If you are a cable operator

interested in making money and you are faced with the virtually cost-free option of banning indecency or the likely costly option of segregating and blocking indecent programming, which option would you choose? The answer seems easy. However, the majority declines to indulge the obvious, contending that "the Commission has yet to consider the matter" of whether the costs associated with segregating and blocking must be borne by the cable operator. The majority also finds that petitioners have not met their burden of proving that the costs of implementing section 10(b) would drive cable operators to ban indecent speech under section 10(a), a conclusion that seems a bit circular given that the Commission has not yet considered the matter. Nevertheless, the majority admits that "[t]he situation might well be different if the Commission were to adopt a policy that created a significant economic disincentive for operators to segregate and block indecent programming." I think that financially minded cable operators will have little doubt which option to choose. Because sections 10(a) and 10(b) are linked—indeed the costs associated with section 10(b) will prompt financially minded cable operators to choose section 10(a)—the majority's attempt to divide and conquer is not ultimately persuasive.

If the statute did not contain section 10(a), I might agree with the majority that section 10(b) passes constitutional muster. The Government claims that the statute is meant to protect children from the harmful effects of indecent programming. Had the Government offered some evidence of the harmful effects of indecent programming on children, I might find section 10(b), standing alone, constitutional. "When the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.'" *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445, 2470 (1994) (plurality) (quoting *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1455 (D.C. Cir. 1985)). The Government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.*

(citing *Edenfield v. Fane*, 113 S. Ct. 1792, 1798–99 (1993)). The Government has not offered one shred of evidence that indecent programming harms children.

The Government might have suggested that section 10(b)'s segregate-and-block scheme was meant to further a compelling interest in facilitating parental supervision of the cable programs their children watch. Indeed, in a case argued the same day as this one, the Government described its interest in promoting the well-being of children as encompassing both the interest in shielding children from indecency and facilitating parental supervision. See Brief for Respondents at 16–17, *ACT v. FCC* (No. 93–1092). This second interest undoubtedly finds ample support in Supreme Court case law. See, e.g., *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (stating that “constitutional interpretation has consistently recognized that the parents’ claim to authority in their own household to direct the rearing of their children is basic in the structure of our society”); *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925) (striking state law requiring children to attend public schools as “interfer[ing] with the liberty of parents and guardians to direct the upbringing and education of children under their control”); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (striking state law that prohibited teaching in foreign languages to children as interfering with “the power of parents to control the education of their own”). Contrary to Judge Wald’s dissent, I do believe that a segregate-and-block scheme would facilitate parental supervision.

In fact, I might find that section 10(b), standing alone, is the least restrictive means of furthering the Government’s interest in facilitating parental supervision of children. A segregate-and-block system can help parents monitor the programming their children watch. For those parents who want to keep all indecent programming out of the house, it provides an easy mechanism to do so. For those parents who wish to expose their children to the myriad of leased-access programming, section 10(b) allows them to subscribe to the segregated channels. For those parents who wish to do their

own screening, it undoubtedly helps to know that all of the leased-access "indecent" programming is located on one channel. Those parents can control their children's viewing either by instructing them about what they may not watch or by using a lockbox or some such device which gives television owners control over unwanted programs. As Judge Wald notes, the segregate-and-block methodology embraced by section 10(b) is a rather unsophisticated approach to achieve a goal of parental supervision: surely Congress has reason to know that there are more efficient technological devices available to segregate and block categories of programs and thereby facilitate parental choices of preferred programming. Despite the legislative failure to adopt more efficient alternatives, I would still find section 10(b) unobjectionable if it stood alone and if the Government justified it as a means to facilitate parental supervision. What I might think if the statute were written differently, however, does not help me deal with what is now before the court.

As I see it, sections 10(a) and 10(b) are connected parts of a whole, which work in tandem to produce an absolute *ban* on indecent speech. A ban does nothing to facilitate parents' supervision of their children, unless we assume that all parents' views are not only identical to each other, but also the same as the Government's. This assumption is preposterous, and the Constitution simply does not permit a flat ban of protected speech.

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There is one other aspect of the majority opinion that I find troubling. In a somewhat obscure line of analysis, the majority intimates that *cable* should be subject to the same First Amendment protections as *broadcast*. To advance this point, the majority argues that "the constitutionality of indecency regulation in a given medium turns in part, on the medium's characteristics" and that "it is apparent that leased access programming has far more in common with radio broadcast in *Pacifica* than with the telephone communication in *Sable*." This simple equation is superficially appealing, but it does not produce the result suggested by the majority.

For many reasons that need not be addressed here, I surely agree with the majority that it makes no sense to treat broadcast and cable differently. It does not follow from this, however, that the First Amendment protections afforded to cable should be *reduced* to the level normally reserved for broadcast. See *FCC v. Pacifica*, 438 U.S. 726, 748 (1978) (“[O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection.”). In fact, the Supreme Court recently decided this question and rejected the position seemingly advanced by the majority:

We address . . . the . . . contention that regulation of cable television should be analyzed under the same First Amendment standard that applies to regulation of broadcast television. . . . [T]he rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, whatever its validity in the cases elaborating it, does not apply in the context of cable regulation.

Turner Broadcasting, 114 S. Ct. at 2456.

Content-based regulations of cable television programming must satisfy exacting First Amendment scrutiny. And a regulation premised on a claim that “indecent” programming causes harm to children must be justified by some evidence of the harm claimed.

POSTSCRIPT

This court has spent a great deal of its energy analyzing section 10: the court has now heard the case twice; and it has produced opinions of considerable length, analyzing a great deal of constitutional case law. And yet, I cannot help but wonder what Congress is doing. Why has Congress chosen to regulate “indecent” on leased-access and PEG-access channels, as opposed to all cable channels? Congress claims it is concerned with protecting children from the ills of televised indecency. Is there any viewing individual who would suggest that leased-access and PEG-access channels constitute the principal sources of our indecency problems on television? While, as the majority states, “there is no consti-

tutional rule forbidding Congress from addressing only the most severe aspects of this problem," it is ridiculous to believe that leased-access and PEG-access present the most severe aspects of the indecency problem on television in American society.

The majority acknowledges that "there undoubtedly is indecent programming on other cable channels," but notes that "[o]perators have the power to impose a segregation and blocking system on the vast majority of their non-access channels, because their editorial control over such channels is unfettered by federal regulation." While cable operators may have that option, there is nothing to suggest that they are voluntarily segregating and blocking indecent programming in the absence of the Government's regulatory hand. And if Congress really believes that indecent programming is harmful to children, why are commercial cable operators given a free hand to do as they see fit? This makes no sense whatsoever.

The majority quotes the FCC, stating that cable operators generally may provide indecent programming through "per-program or per-channel services that subscribers must specifically request in advance, in the same manner as under the blocking approach mandated by section 10(b)." However, this is no answer at all, because the current arrangements for cable subscriptions do not purport to segregate "indecent" programs on select channels (or otherwise carefully identify them) so that they might be systematically offered in isolation apart from other commercial offerings. Furthermore, many subscribers purchase cable service to get improved television reception, and a number of basic cable subscriptions are packaged to include channels that offer some indecent programming; so these subscribers will get indecent programming whether they want it or not. In short, *if* "indecency" really is a problem on television, then the source of the problem resides on the commercial cable stations, not on leased-access and PEG-access channels. Yet, Congress has done nothing to facilitate parental supervision in connection with commercial cable programs.

Even more curious is Congress's failure to address violence on television. One recent poll revealed that eighty percent of Americans surveyed agreed that violence on TV shows is harmful to society. See 139 CONG. REC. S5050-52 (daily ed. Apr. 28, 1993) (summary of Times Mirror poll). And there is significant evidence suggesting a causal connection between viewing violence on television and antisocial violent behavior.¹ Yet, as this case shows, Congress has focused on a mere pittance in addressing indecency on PEG- and leased-access cable, where viewership is paltry. And in focusing on indecency, as opposed to violence, Congress has addressed a "problem" that has yet to be shown to have any harmful effects. This is hard to fathom.

It is not my role as a judge to legislate, I understand. But it is hard to restrain from comment when one is asked to spend so much time on something of so little consequence in terms of its overall effect on society. From my vantage point, Congress seems to have sent the FCC on a fool's errand. Even if section 10 were constitutional—as the majority holds that it is—one still would be tempted to ask, "so what?". I cannot dismiss the importance of the First Amendment rights at stake, however, so I dissent. In my view, sections 10(a) and 10(b) of the Act as presently written offend the Constitution.

¹ See, e.g., ALBERT BANDURA, *AGGRESSION: A SOCIAL LEARNING ANALYSIS* 72-76 (1973); WILLIAM A. BELSON, *TELEVISION VIOLENCE AND THE ADOLESCENT BOY* (1978); GEORGE COMSTOCK, *THE EVOLUTION OF AMERICAN TELEVISION* 159-238 (1989); MONROE M. LEFKOWITZ ET AL., *GROWING UP TO BE VIOLENT: A LONGITUDINAL STUDY OF THE DEVELOPMENT OF AGGRESSION* (1977); L. Rowell Huesmann, et al., *The Effects of Television Violence on Aggression: A Reply to a Skeptic*, in *PSYCHOLOGY AND SOCIAL POLICY* 191 (Peter Suedfeld & Philip E. Tetlock, eds., 1992); David Pearl, *Familial, Peer, and Television Influences on Aggressive and Violent Behavior*, in *CHILDHOOD AGGRESSION AND VIOLENCE: SOURCES OF INFLUENCE, PREVENTION, AND CONTROL* 231, 236-37 (David H. Crowell et al., eds., 1987).

ROGERS, *Circuit Judge*, concurring in part and dissenting in part: Because the court is in agreement that § 10(b) constitutes state action,¹ the most important question in this case is whether the segregation and blocking method established by § 10(b) is the least restrictive means to accomplish the compelling state interests asserted. Essentially for the reasons noted by the Supreme Court in *Sable Communications, Inc. v. FCC*, 492 U.S. 115 (1989), the government has failed to support § 10(b) with the requisite showing that the segregation and blocking method represents the least restrictive alternative. It is neither carefully tailored nor supported by evidence that less restrictive alternatives are not readily available. Parts II and III of Judge Wald's dissenting opinion ably describe these deficiencies, and I join her conclusion that § 10(b) is unconstitutional whether it stands alone or in conjunction with the other provisions of § 10.

The court, however, has an obligation to save rather than destroy as much of the statute as is constitutional, *see Tilton v. Richardson*, 403 U.S. 672, 684 (1991) (citations omitted), and, in my view, § 10(b) is severable. Consequently I cannot join Judge Wald's analysis of the severability of § 10(b) from the remainder of § 10 or the constitutionality of the provisions remaining after severance. *See* dissenting opinion of Judge Wald at 10 n.7, 28-31; *see also* dissenting opinion of Chief Judge Edwards at 5.

The standard for determining the severability of an unconstitutional provision is well established: Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987) (internal quotation marks and citation omitted); *Buckley v. Valeo*, 424 U.S. 1, 108-09; *Champlin Refining Co. v. Corporate Comm'n.*, 286 U.S. 210, 234 (1932). "[T]he presumption is in favor of severability." *Regan v. Time, Inc.*, 468 U.S.

¹ *See* majority opinion at Part III; dissenting opinion of Judge Wald at Part I; dissenting opinion of Chief Judge Edwards at 2.

641, 653 (1984) (plurality opinion); *see also Alaska Airlines*, 480 U.S. at 685 (“the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted”).

This presumption is not rebutted with respect to the three remaining subsections—(a), (c), and (d). It is true, as Judge Wald notes, that one purpose of § 10 was to “forbid cable companies from inflicting their unsuspecting subscribers with sexually explicit programs on leased access channels.” 138 CONG. REC. S646 (daily ed. Jan. 30, 1992) (Senator Helms). *See* dissenting opinion of Judge Wald at 10 n.7. Senator Helms’ statement quoted by Judge Wald, however, is not the only statement of Congressional intent with respect to § 10. Congress also intended to free cable operators from the burden of being required to carry indecent materials on both leased access and PEG channels. The clear purpose of § 10(c) is to empower cable operators to exercise editorial judgment over their PEG channels to prohibit sexually explicit conduct and materials soliciting or promoting unlawful conduct.² Similarly, one of the purposes of §§ 10(a) & (b) was to restore editorial control over leased access programming to the cable operators, a goal deemed of importance to several Senators who spoke in support of the amendments.³

² Senator Fowler offered § 10(c) in order to remove the restriction on the authority of cable operators to prohibit indecent programming on PEG channels. 138 CONG. REC. S649 (daily ed. Jan. 30, 1992). He referred to the use of PEG channels to “basically solicit prostitution through easily discernible shams.” *Id.* Senator Wirth, also decrying the abuse of PEG channels, spoke in support of § 10(c) as “giv[ing] a very clear signal to the cable companies that, in fact, they can police their own systems, which they cannot do now. This is a service not only to the public, but, also, to the cable companies themselves.” *Id.* at S650.

³ In introducing what became §§ 10(a) & (b), Senator Helms explained that “[t]he problem is that cable companies are required by law to carry, on leased access channels, any and every program that comes along. . . .” 138 CONG. REC. S646 (daily ed. Jan. 30, 1992) (regarding § 27 of the Senate bill). He explained that his amendment had two parts:

See also majority opinion at 19 (“The immediate aim . . . is to give cable operators the prerogative not to carry indecent programming on their access channels.”). Implicit in these comments and the adoption of § 10(c) alone with respect to PEG channels, is the expectation that the restoration of such control would serve the Congressional goal of reducing the amount of indecent programming that appears on cable television and is therefore potentially accessible to children. Thus, it is clear that §§ 10(a) & (c) do fulfill at least one of the purposes of § 10, even when § 10(b) is severed. *See* 2 NORMAN J. SINGER, SUTHERLAND ON STATUTES & STATUTORY CONSTRUCTION § 44.07, at 518 (5th ed. 1993) (If a statute “attempts to accomplish two or more objects and is void as to one, it may still be valid as to the others.”) (citation omitted).

Once § 10(b) is severed, § 10(a) no less than § 10(c) would be constitutional. *See generally* majority opinion Part II;⁴ *see also* dissenting opinion of Chief Judge Edwards at 2.

Under my amendment, cable operators will have the right to reject such filthy programming, and if they do not reject it, consumers have the right to reject such programming from being fed into their homes.

...
 . . . First, the pending amendment will allow a cable company to decline to carry on leased access channels programs that “describe or depict sexual or excretory activities or organs in a patently offensive manner.”

...
 The second part of the pending amendment . . . requires the FCC to set rules [to segregate and block] unless a subscriber requests in writing such channel to be unblocked.

Id. In support of Senator Helms’ amendment, Senator Thurmond also expressed a desire to relieve cable operators of the obligation of carrying indecent programming. “The problem is that cable companies are required by current law to carry on these leased channels any program that may come along.” *Id.* at S648.

⁴ I agree with the reasoning in Part II B only to the extent that the court concludes that petitioners have failed to show here, on this record, that the leased access and PEG channels are “public forums.” *See* dissenting opinion of Judge Wald at 10 n.8.

Although the question is not without difficulty, that §§ 10(a) & (c) restore to cable operators editorial control over a narrow and content-based class of speech, *see* dissenting opinion of Judge Wald at 30, does not render them unconstitutional. *See* majority opinion at 14–15. Without the alternative regulatory scheme, imposing the combined technical, administrative, and financial burdens on cable operators as exists under § 10(b), the cable operator is left with the option, on the one hand, to allow, encourage, or facilitate indecent speech, or, on the other hand, to ban or otherwise impede indecent speech; there is no state imposed burden on the choice.

Accordingly, I concur in the judgment of the court upholding §§ 10(a), 10(c) and 10(d), but I dissent from the holding in Part III that the government has met its burden to show that § 10(b) is the least restrictive alternative; in that regard I join Parts II and III of Judge Wald's dissenting opinion.