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Expansion of Indecency Regulation: Presented by the Federalist Society's Telecommunications Practice Group*

Panelists:

Hon. Kevin J. Martin**

Mr. Adam G. Ciongoli***

Mr. Robert W. Peters****

Dr. Roger Pilon*****

Hon. David B. Sentelle*****

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JUDGE SENTELLE: I've been alerted that we may start. There will be just a very little introduction, so you'll know you're in the right place. This is the Telecom panel. We will be dealing with the expanding or contracting or changing, or whatever they are, regulations on indecency from the Federal Communications Commission.

I will introduce each speaker briefly, and your first speaker will be presenting, I presume, the case for the Commission, is Kevin Martin, who is the Chairman of the FCC. It's not his first appearance at a Federalist function, as I moderated a panel last year on which the Chairman was speaking. I pointed out then that he holds a Bachelor of Arts degree in political science from the University of North Carolina. I would say that I hold one of those, too. Political science degrees in Chapel Hill were like social diseases; if you stayed there long enough, somebody gave you one.

However, after that, he went on to get further education, including a J.D., *cum laude*, from Harvard Law School, among other things. He has worked before as a counselor for the Commission; as a member of the Commission; he's now Chairman of it. And without further ado, Chairman Kevin Martin.

MR. MARTIN: Thank you, Judge. And thank you all for inviting me to participate today. Although, I did get nervous when anybody who introduces me says I'm going to be speaking in defense the Commission and the government in general. So that makes me a little bit anxious when I get that role. You know, and I think it's particularly difficult, actually, whenever you're dealing with issues related to indecency or content.

Trying to determine what's appropriate or inappropriate, at times, for what's on television or radio is probably one of the most difficult issues that the Commission faces, and I think it's one of the most difficult ones for all of the Commissioners. And it's obviously a difficult thing to end up doing. At times, it's very uncomfortable trying to figure out where those bounds are. And in general, I recognize, and I think it's important to remember, that the government is generally not as good at trying to make those determinations about content, which is in many ways why there are so many First Amendment protections about making sure the government doesn't get overly involved in content restrictions.

In general, one of the things that gets lost in the debate far too often is that parents and families really are the first and best line of defense for what's appropriate on television and radio. And I think it's one thing that we should be encouraging more active involvement with, and I certainly think everyone at the Commission feels that, to the extent that parents could be taking a more active role; that's the first line of defense—being

able to turn inappropriate programming off is what we should all be focused more and more on.

And I also think it's equally important to recognize some of the corporate responsibilities that some of the companies can end up having by trying to be good corporate citizens and making sure that they're putting on programming at times when children are most likely to be in the audience; that is going to be most responsive to the concerns that some of the parents are raising.

But that all being said, the government does have a role, and the FCC does have a role, in enforcing some of its indecency rules. Congress has passed a law that says there are some limits as to what can be placed on over-the-air television and radio. The Commission adopted rules limiting the content that's on television and radio in certain circumstances—and at certain times of the day—when children are most likely to be present. The Supreme Court ultimately upheld those rules when they were challenged, and I think it's the responsibility of the Commission to enforce the rules that are there.

And so, I think there's a variety of things that the Commission can do to try to address the issue. But I think it is important to recognize that there has been, over my time on the Commission, an increasing concern expressed by a lot of parents about exactly the kind of content and the programming that is available and is being put out over the air.

You know, when I arrived at the Commission, we received a couple hundred complaints a year. As a matter of fact, in the year 2000, the year before I arrived, we had less than 120 complaints for that year. But by two years later, we were receiving complaints in the thousands; we had almost 14,000 complaints two years later. The year after that, in 2003, we had hundreds of thousands. And in 2004, we had over a million complaints. I think that that's clearly reflective of an increasing concern among parents and uncomfortableness about what is being put on over-the-air in television and radio, and also increasingly frustration about the responsiveness to their concerns.

And so there are several things the Commission has done and needs to do. Obviously, they need to enforce the rules. I think they need to clarify, for example, that the broadcast affiliates have the right to reject inappropriate programming that the networks are providing, and that that's something that's guaranteed as part of their contractual rights and as part of our rules.

I also think there are several things that broadcasters need to do to try to address the issue, and I've encouraged for a long time, for several years, the broadcasters to try to reinstate a family hour, at least one hour of

programming a night when they would have programming that is appropriate for families.

And I've also encouraged the cable industry to take several steps to try to address the programming and the content that's available to them. And I think that's included a variety of things that I've encouraged the cable industry to do, including putting on a voluntary family tier, which would have programming that could be sold separately; then their expanded basic tier, which was designed for families. They could give consumers more choice, whether that is an opt-in or opt-out model of programming; some form of à la carte, some form of additional choice within packages. I'll pay forty dollars a month for forty channels, but let them choose which forty channels they want. Or, have some kind of basic standard that should be applied to some of the channels that they are providing in a package. And I think that any one of those options would be important steps that I think the cable industry could take, as well, to try to address the increasing frustration that we see not only on the broadcast side but also on the cable side. We would continue to encourage those.

I think that when you're talking about this issue, I think you do have to put in context some of the levels of the concern that have been expressed. And it's not just the total number of complaints that are filed with the Commission. The Kaiser Family Foundation released a report yesterday talking about the increase in sexual scenes, in sexual content, that's on TV today and how much it's dramatically increased, even since the late 1990s. They released a report two years ago that talked about the use of profanity during what used to be determined as the family hour. It increased by ninety-five percent during that same timeframe, from 1998 to 2002.

Time Magazine had an article this past summer that talked about how sixty-six percent of the people in the country think that there's too much violence on TV; fifty-eight percent believe there's too much coarse language; fifty percent believe there's too much explicit sexual content; more than half of those polled in that *Time Magazine* survey indicated that the government should do more and be stricter in its enforcement.

Similarly, the Pew Research Center released a report last spring that talked about seventy-five percent of those surveyed favored tighter enforcement of government rules. Sixty-nine percent backed steeper fines, and over sixty percent supported some kind of extension of a standard about what's appropriate to cable television.

While I think the Commission is going to be responsive to the complaints that are filed in front of us, I think that it's not just the complaints that are in front of us. It's also these recent statistics of surveys that indicate that there is a growing frustration among parents and

consumers about some of the content that is being put over the airwaves, both on television and radio, and some of the content that's on their cable television channels that are part of the packages of channels that they are required to purchase if they want to get other programming that is being offered.

So, I'm not sure exactly where our discussion will end up taking us, but why don't I just stop there, and then I'll look forward to having a continuing and interactive dialogue as the other panelists go forward.

JUDGE SENTELLE: Very good. I'm not going to get back up, since nobody else seems to be. I understand that one of those complaints to the FCC came from a woman who said there was way too much sex and violence on her husband's DVD player.

I don't think that was filed by the wife of Adam Ciongoli, who's our next speaker. He's Senior Vice President and General Counsel for Time Warner Europe. Prior to that, he's been counselor to Attorney General John Ashcroft on constitutional matters, among others; chief counsel to the Senate Committee on the Constitution; he taught constitutional law at Georgetown; he's a graduate of Georgetown University Law Center; and among other things, he was law clerk to someone named Samuel A. Alito, whom you may have heard of lately. And he probably won't take a question about that, but he will about the FCC regulation.

Adam.

MR. CIONGOLI: Thank you, Judge. I'm actually happy to talk about both, and it might be easier to talk about Judge Alito.

Over lunch today, I was sort of reviewing my notes and asking myself how I got talked into this. You know, Leonard Leo calls me from time to time, and this time said, "you know, we're having this conference and maybe about this." I said, "Sure, Leonard, anything you want." He said, "Great, we want you to defend indecency." And I sort of took a step back, and I said, "I think that I can defend a different principle here."

I want to start from two principles. The first is that there is too much on television that is thoroughly inappropriate for children. There's no question about that. I think we can all agree on that. I mean, just think about James Carville, for example. The second principle is that parents should have the tools to control what their children are watching in their own homes. I think neither of those are controversial in this room and probably in most of America.

But what we're here to talk about today is what the federal government, and in particular what the FCC, can and/or should do about that. I'm going to leave for a different panel the question of whether or not

the Federal Communications Commission, as an independent agency, is constitutional. Instead, I'm going to talk a little bit about the First Amendment principles, from, I think, a conservative perspective, that are at stake with the FCC regulating content.

The Supreme Court has been very clear on this in the broadcast context—in the *Pacifica* case, back in the 1970s, the George Carlin case—they said very clearly that there are certain interests, a compelling state interest, in the context of broadcast media, protecting children which allows the government—Congress—to regulate content in the context of broadcast.

Well, broadcast is very different. It's very different than non-broadcast media. It's different than satellite; it's different than cable. One of the things that I talked about in the *Pacifica* case was that it was sort of an intruder in the home, an uninvited guest. Cable is not an uninvited guest; satellite is not an uninvited guest. You go out, and you pay for it. You pay often a lot of money for it. And so it's interesting that you cite statistics that people think there's too much violence; sixty-eight percent think there's too much sex on television.

It reminds me of the story of the old couple who go to a restaurant. The food comes, and they are eating, and the wife says to the husband, "Oh, my God, the food here is terrible," and the husband says, "Yeah, and such small portions." And that's really, I think, what we're dealing with here; you have people who bring something into their home and then they don't necessarily like what's on it. Well, great. You know what? The cable industry actually has recognized that and has done something about it. They have instituted the ability, through technology, to block channels. So you can do that. You don't have to have channels in your home. And that is sort of a great balance.

So, the Supreme Court, in a 2000 case dealing with the cable industry—the *Playboy* case, *United States v. Playboy*—said content regulation, based on content, is subject to strict scrutiny. And strict scrutiny means that there has to be a compelling state interest and that the government's answer has to be narrowly tailored to achieve that interest. So, we need to look at whether or not various things that are suggested by the government are burdens on content, content-based burdens on speech, whether or not they serve a compelling state interest, and whether the remedy is narrowly tailored.

Now, I think that the whole thing really comes down to the issue of burdens. Because there already is a narrowly tailored remedy—you've got a chip into televisions. You have the ability to block any channel that comes in. Anything more onerous than that, I think, isn't the most narrowly tailored result, and therefore it would fail strict scrutiny. And I think it's

hard-pressed to say that tiering, or even à la carte, isn't a content-based restriction. Tiering clearly is. Tiering clearly says that you have to offer a certain kind of content. It's got to be a content that is family-friendly, which means that you have to offer a product which excludes, which censors out, other viewpoints.

Now arguably, à la carte is a little bit harder. You know, they're just saying, look, you just have to offer everything independently. Well, there's a question as to whether consumers really want that. I mean, do consumers really want to have no discount for bundling? In some ways, I suspect cable companies would love that. You know, you have them buy each channel individually, and we get to charge more for each channel at that point, because instead of getting a basic cable package with ten channels of news and whatever else you might want, you're going to have to pay for each channel independently. And if you have any bundling at all, it gets back to whether or not you're regulating content, whether or not the government is dictating certain types of content that can be carried in groups and can't be carried in groups.

One thing that is notable is that there have been attempts in this area. DIRECTV offered a family-friendly tier a few years ago. They were charging five dollars a month for it. There were arguments as to whether or not there was enough in it to make it interesting, but it was not a success economically. And the question there gets to whether it's appropriate for government to be having an argument with private industry; whether government should be saying, look, you're not offering the right product, which is why people aren't buying it. As a general rule, I think most conservatives, most libertarians, would rather not have government saying to private industry, the reason that your product isn't working is not a failure of the market, it's because government hasn't told you the right way to produce the product.

So, from a legal perspective, I think it's actually a pretty straightforward case. I think it is a burden on speech. I think it's content-based. I think this compelling state interest, which is generally put forward, which I believe is a compelling state interest, is to help parents help their children and to protect their children. And so the question is whether it's narrowly tailored. And I believe that the industry already is regulated in a way that's narrowly tailored.

The one other interesting question is whether or not there are other compelling state interests that could be out there. We haven't heard that recently, but it's sort of a question of, not do we empower parents to take care of their children, but do we simply protect children? Is that the compelling state interest? The Supreme Court rejected a similar argument like that in the *Playboy* case. And I think both for legal reasons but also for

policy reasons, I mean, when you look at the strict scrutiny test, unfortunately, it really is a policy analysis. It doesn't have—there's no strict scrutiny clause to the Constitution.

You know, does the government have a compelling state interest in protecting children where parents abdicate their responsibility? I don't really know that they do, and I don't know that we want them to. I don't know that we want a society where the government creates incentives for parents to abdicate their role because government's going to take care of those things. You know, the Constitution—I paraphrase Justice Scalia in a speech I heard him give about fifteen years ago a lot, and it's that the Constitution does not provide the fix for everything that's wrong or protect everything that's right. You know, the First Amendment exists to protect some things that are unpleasant, that are offensive.

We're not talking about obscene speech, speech that does not have constitutional protection, I think the First Amendment applies a very rigorous standard. I think that's a good thing.

I'll end there.

JUDGE SENTELLE: Well, presumably, we'll be getting a very different view of the subject from our next speaker, Robert W. Peters, who is the president of Morality in Media, Inc. He's a graduate of New York University School of Law, Dartmouth College, where he tells me from his résumé that he co-captained Dartmouth's 1970 undefeated football team. I had a law clerk who played football for Dartmouth. He said it was a little like playing college football. But I digress.

Mr. Peters has spent a large part of his career on the subject that we have before us today. He was assistant director of the National Obscenity Law Center, and he has spoken and written a great deal on the kind of regulation we're discussing now.

Mr. Peters.

MR. PETERS: I will begin by saying that in 1970, we were ranked in both the AP and UPI polls ahead of Penn State. And Joe Paterno wanted to play us in a bowl game, and our coach said, "if we're going to play a bowl game, we're going to play against somebody with a better record than Penn State." I think they were seven and four that year. Undoubtedly, we're the last Ivy League team to be ranked in the national polls, but then we went to the gradations of colleges after I left.

JUDGE SENTELLE: I'm sorry I brought it up.

MR. PETERS: I have to clarify.

I don't normally read remarks, but this happens to be in the interest of time, and because I'm going to talk about something I don't normally put in language, I'm going to read my relatively brief comments.

As I understand the constitutional history, the First Amendment's freedom of speech and press clause was intended primarily to protect ideas, viewpoints, and opinions on matters of public concern. For example, it protects Hugh Hefner, Larry Flynt, and Howard Stern when they express their, in my opinion, obnoxious opinions, or opinions about politics, pornography, religion, or sexual morality. It was not intended to create a right to distribute pornography, to perform nude or semi-nude in public places to sexually arouse patrons, to distribute entertainment that is injurious to minors, without any legal responsibility to restrict minors' access to that entertainment. It was not intended to create a right to curse up a storm, or perform naked in a public park, or to stand on a public sidewalk with the loudspeaker so you can be heard and tell dirty jokes to entertain some and offend others.

In my opinion, when Congress enacted in 1927 legislation to prohibit obscene, indecent, or profane language in broadcasting, it did not have spectrum scarcity in mind. It did not have broadcasting's uniquely pervasive presence, because in 1927 broadcasting was not pervasive. What Congress had in mind was the public nature of broadcasting. In many respects, broadcasting was like a real-space county fair, with a variety of education and entertainment exhibits and events. A county fair was open to everyone. All that was needed to gain access was a means to get there. With broadcasting, all that was needed was a radio. And just as states and municipalities properly prohibited public indecency at a county fair, so Congress properly prohibited indecency in broadcasting.

I would add that a public indecency law would apply, even if a fair sponsor charged a one-time or daily admission fee, and even if children under a certain age had to be accompanied by a parent or guardian. A public indecency law would also apply to a privately-owned amusement park, like Disneyland or a traveling circus or carnival, which existed when I was a kid, regardless of whether an admission was charged, and regardless of whether the carnival or circus set up on public or private land.

A question today is whether cable, satellite TV, satellite radio, and cell phones should be exempt from indecency regulation, even though these media utilize the public airwaves or public right-of-ways and are, at least in their basic service, available to the public just like traditional broadcasting. I will add that on its face, the definition of broadcasting clearly encompasses satellite TV and radio and wireless.

Among the many books I would love to read is the one entitled *The Death of Common Sense*. Common sense ought to inform us that generally speaking, the same governmental interests—protecting children, protecting consenting adults, and maintaining a decent society—are at stake, regardless of whether the signal arrives over the airwaves or through a wire or both, and whether the service is paid for through a recurring fee or through advertisements. Someone is sure to say, “well, it’s up to parents to block offending content,” and I think we would all agree with that.

But there are four problems with the parents-only solution. First, for a variety of reasons, many parents won’t utilize blocking or will do so only after they discover a problem and after the damage is done. Second, blocking doesn’t always work, and tech-savvy kids can circumvent blocking. Third, as children get older, they have more and more access to media outside the home. While parental blocking, I assume, is most assuredly the less restrictive means, it is by no means the least restrictive effective means of protecting children from indecent content in media.

Fourth and last point, children aren’t the only concern. Unconsenting adults also have rights, despite what the current Court may think or how it may act, particularly in the home and in a captive audience. And the Supreme Court has said that to say that one may avoid further offense by turning off the radio is like saying that the remedy for an assault is to turn after the first blow. And another thing I think our current Court has largely forgotten about, but previous courts have acknowledged—the right of the nation and of the states to maintain a decent society.

JUDGE SENTELLE: Thank you, Robert.

When we discuss the solution of technologically blocking channels, I stop and think that in many households, the only person who has the know-how to do anything technologically beyond change channels or turn the set on or off is the kid. And I have a vision: “Junior, I’d like you to block that channel you like to watch.” “Sure, Dad, I’ll take care of it.”

That said, I think we’ll get a very different view from Roger Pilon, who’s no stranger to these Federalist Society panels. Roger describes his profession as that of a philosopher of law. He’s a graduate of Columbia University and the University of Chicago, where he has an M.A. and Ph.D. in philosophy, a J.D. from George Washington, in law. He has served the prior administrations, and he is the vice president for Legal Affairs at the Cato Institute, and I’ve never known him to be in favor of regulation of anything. And I’ve known him a while.

DR. PILON: Well, hold on to your hat, David. I may surprise you today. But let me not give it away. When we had our conference call about

a week ago to discuss our presentation, I asked to go last because I knew very little about this subject, although I recalled I had been asked by Congress to testify on it a few years ago, which doubtless says something about Congress.

But anyway, it reminds me or brought to mind the experiments of some years ago, where physicists would get together in a think-tank, and they'd bring some man off the street because he might see something that those schooled in the subject didn't see. And I guess that experiment ended up something like the monkeys that are brought in and put in front of typewriters, in the hope that eventually *Hamlet* would emerge from one of those typewriters. And I think that nothing did. But I hope that today, some sense will come from this discussion, from someone who does not specialize in this area at all.

I quite agree with Kevin and Rob insofar as they argue that there is a certain coarsening in the culture as a result of so much that comes over the media. All you have to do is look at the old movies that are regularly shown on television, and you will see the coarsening in the language. And in those days, they used standard English, unlike today.

But the question is, in a free society, what are we going to do about that? And this debate, of course, has been raging for longer than television or radio have been around. It goes way back. And for all that's been said and written on the subject over the years, there are still some very basic points that have been brought out here today.

So, what I want to do in my brief time here is to step back a little bit and try to go to the first principles of the matter to see if that can shed a little different light on it. So forget for the moment what the law says on this matter. Step back into the state of nature, which is of course the theory that the framers used when they sat down to write the Declaration and the Constitution, and then ask what our rights would be vis-à-vis each other with respect to this issue of obscenity or any other form of pornography.

When we're in that state of nature world, of course, it is property relationships that define the rights and obligations between strangers, and the liberty that people have vis-à-vis each other with reference to that property. And of course what we're looking at here is the way people come together in a legitimate way. There are two ways, of course, that it can be done: either illegitimately, through torts or crimes, or legitimately, through promise or contract. And so, when you look at it this way, and you realize that insofar as people are related contractually, that answers so many of the questions of the relationship. At least in most cases, it's relatively easy.

Torts—it starts to get a little difficult when you're dealing with relationships between strangers because you eventually get to the borders, and there are some interesting issues that come up there; not simply

trespass and trespass on the case, but when you get into nuisance, risk, and other line-drawing issues. And so, it seems to me that when you do that, and you look at it that way, and you start to see that in the speech area, broadly understood, you have a series of cases that will help illustrate this. And you look for these extreme examples to see whether you've really got a principle of the matter and, if so, what that principle is.

Take, for example, the standard speech that is involved in threats; I mean, assault as opposed to battery. Here, it seems to me that we have law prohibiting such speech because it amounts to putting someone else into a position such that the Damoclean sword that hangs over his head as a result of your threat, and so we do regulate that speech. And that is a relatively easy case to handle because there is another right that is clearly involved in that, the right to the peaceful and quiet enjoyment of what is yours.

When we get into defamation, it gets a little trickier because it's hard to identify the right that is at issue in a defamation case. As you may know, libertarians are on both sides of the issues. When we get into matters of taste, it's even more difficult because, there, it's extremely difficult to discern the right that may be at issue when people are engaged in activities that involve questions of taste.

At the same time—now we come to the extreme examples, and I'm here now talking not simply about children but about adults as well—there are places where we are going to draw the line, and there are no rights at issue. If you, on your property Blackacre, are engaged in sadomasochistic activities with your friend, I on Greenacre next door do not want to have a situation whereby my only remedy is to put in ear plugs and pull the shades. There is some point at which I'm going to want to draw the line and say that I don't want to live in a society in which torturing animals is allowed.

Now, when you take cases like wanting to get down the street, the question is who owns the streets, and there the rules are perfectly legitimate. You're going to need the combination of democratic decisionmaking on one hand and judicial invocation of equal protection on the other, to do some balancing there. But in this case, where you're in a state of nature and you've got Greenacre and Blackacre and, it seems to me, there is a case that cannot be justified with reference to rights but is going to have to be justified with something else, I don't know what it is. But I, for one, don't want to live in a society in which anything goes, such as torture of animals and the like. And I hope that when I step on that slippery slope, I don't slide all the way down to the end.

But I'm throwing this out to suggest that there are public policy issues. Therefore, we're in a line-drawing situation. Therefore, the principle is something that Churchill might have invoked when he said to the lady,

“we have already established the principle, Madam; we’re now only haggling about the price, or where to draw the line in the matter.”

So what we’ve got here is a case where you’re going to need something like a strong sense of presumptions and burdens of proof. And in a free society, that presumption must always be on the side of the speaker. That is to say, we live in a world in which all that is not prohibited is permitted, as opposed to the other alternative.

Now, having set those parameters, the practical problem, it seems to me, overwhelms the matter. So Kevin and Rob, I’ll give you this principle, namely that the principle is not Absalom, if you’ll give me the presumption and assume the burden. But if you do, I submit that that burden will in most cases overwhelm the enterprise that you’re undertaking. And I will start with the very definition of indecency, or obscenity, if you want, for that matter.

Legislatures and courts, of course, have wrestled with this. Indeed, look at this morning’s *Washington Post*, page one, and you see a story about the very subject that we’re talking about here today. And we got in that article a comment about the Parents Television Council [(“PTC”)]. The PTC supports clear guidelines about what is and is not indecent. The FCC has maintained, however, that such guidelines would amount to prior restraint of free speech. And so, the FCC recognizes that you’re in a problem here, if you’re going to give those clear guidelines.

On the other hand, if you don’t give those clear guidelines, you’ve got a different First Amendment problem; namely, void for vagueness. How does anybody know—and this is one of the things that the broadcasters are up against, as well as the cable and satellite people—how do we know what the lines are? And indeed, it turns out that this is changing over time, as evidenced by the numbers that Kevin cited.

How about the standard on obscenity, “I know it when I see it?” Well, that is not only utterly subjective, but it invokes the rule of man. I thought we lived in a country in which we are under law, not the rule of man. That’s what that kind of a standard gets. When you get into community standards, if complainants are right, we’ve got shipping standards here. When you get into enforcement, you’re going to have to divert resources. Indeed we have, just recently, the idea that the Justice Department is taking people off the issue of counterterrorism and such things and putting them on the porn squad. And it’s raised all kinds of eyebrows in the FBI about that and talks around the water cooler to the effect, honestly, most of the guys would have to recuse themselves from that service.

I could go on with all these problems that you’re going to have coming up, having given you at least something of a principle. But when you get to the issues like cable, satellite, subscriber TV, radio, and so forth,

the argument is that these are enough like broadcast today—eighty-five percent, it is said, of people get their TV from cable and so forth—that they can be regulated very much like the broadcast can, assuming that the regulation of broadcast is legitimate. Well, that may be the case. I'm not sure; again, I'm not an expert on these matters. But it seems to me that we may—emphasis on may—have to be moving in something like the way the Internet does it, where you've got an opt-out, rather than opt-in, if this problem gets that bad—again, emphasis on if.

Obviously, on the Internet there is all kinds of porn available—some of it pretty good, I'm told. I would know that only by secondhand. But I think that this is, at the end of the day, not going to satisfy the critics. And I give you as evidence of that the latest proposals that have come forth on the Internet about red-lighting the Internet with another .XXX category. And here's the response that comes to that, where you have some interesting strange bedfellows.

The anti-porn groups say the .XXX domain would make net porn legitimate, increase the amount of such material, and reduce the pressure on the U.S. government to go after pornographers. So their aim is ultimately that. "The .XXX domain proposal is an effort to pander to the porn industry and offers nothing but false hope to an American public which wants illegal pornographers prosecuted, not rewarded," said Patrick Truman of the Family Research Council.

By contrast, the porn people, many of them at least, don't want to be relegated to zones, as they say, on the margins of Internet traffic, or that move might turn out as a tool for regulation or prosecution. So I don't think that even if we move in this direction, it's going to solve the problem.

So to draw this to a conclusion, I agree, there are some times when society is going to have to prohibit activity that cannot be . . . justified on a rights basis. It's the notion of public community standards. It is fraught with peril, however, and I suggest that in this area the difficulties are so great that, by and large, we're not going to be able to move very far in this area.

JUDGE SENTELLE: Thank you. Before we give the opportunity to the panelists to comment briefly on each other's comments and open the floor for questions, I had just a couple of comments on Roger's remarks. The first is with the allusion to porn on the Internet. We learned from various kinds of litigation over the porn on the Internet that the pornographers are actually responsible for most of the technological advances in Internet, including pop-up advertising. I guess that tells you where the market is on that.

The other thing—when you referred to “I know it when I see it,” that is a quotation, for those of you who were too young to remember this, from Justice Potter Stewart. The response at the time was, what are we going to do when he dies? He’s been dead for some years now. So I guess that’s why we’re having this panel, is to figure out what we did after Potter Stewart died.

With that, Chairman Martin, we’ll give you a couple of minutes to comment on your panelists’ remarks, if you’d like.

CHAIRMAN MARTIN: Sure. Listen, I guess first I would say I think I largely agree with most of the comments by all of the panelists, which I think recognize the difficulties. I mean, whenever you’re talking about a line-drawing exercise, you’re talking about what is the standard that would accompany that line, and it is a very difficult exercise. I don’t disagree with that.

I am struck a little by, though, even in the last panelist’s discussion about how we should think about this in terms of contractual rights first, and property rights, and then moving on to what we do beyond that, and contrasting those with some of the other concerns that we talked about, or that Adam and I discussed, for example, when we talked about a standard that would be applied to other kinds of media.

First of all, when I have talked in the past about the fact that parents should have additional tools to control some of the content that’s being given to them over these other forms of media, oftentimes I have been trying to encourage the media themselves to provide the parents with those traditional tools. I think we’d all be better off, if that were the case, and I would continue to encourage that.

But at bottom, when we’re talking about whether or not broadcasting is an uninvited guest, but cable or satellite television may not be, I think you do have to take into consideration the kinds of—when that’s the argument you’re making—packages that are currently being offered, and whether or not all of the channels that are included in that basic package are actually individually selected. And while Adam said he thinks cable companies would be happy to offer everything in an à la carte pattern, they certainly are fighting that tooth-and-nail on the Hill. And so, if they are happy about it, they forgot to tell their industry association that they’re supportive of it. And while they certainly may have a First Amendment right to put anything on, there is no First Amendment right guaranteeing that they get paid for it.

I think that those are some of the underlying issues when we’re talking about paid media, it is not just the ability for parents to be able to have some of those tools that you talk about, for example, in how easy

blocking is, but many of those are easily available, for example, in the digital tiers that are offered today. Only twenty-four percent of homes today have digital cable as an option, and that means a significant number of them still would have to be blocking channels either by calling people and asking them to come and lay individual traps, in a technical sense, to prevent channels from getting there.

And so, I think it is much more difficult to do, and I also think there are some issues as it relates to whether or not people are actually selecting and having some of that content actually be in their homes, it's something they've actually selected. Obviously, whenever they are, there's no reason to have any kind of a standard, and I do think that that gets to some of what one of the other panelists talked about; maybe this needs to be more of an opt-out kind of routine, in which people are able to opt out of certain kinds of programming. And that's one of the things I guess I would include as certainly giving consumers more choice. I do think that that would resolve a lot of the issues—that they were able to opt out of particular programming. And I think that that would end up certainly addressing a lot of it.

JUDGE SENTELLE: Adam.

MR. CIONGOLI: Well, I think that consumers are opting out right now. I think that in most circumstances, if not all, currently they are able to call their local cable channel and have channels blocked, even if they're in analog form.

I guess what the conversation sparks for me is the idea of what is effective here and who judges what's effective. And the concern that I have is that the people who are advocating regulation believe that in a perfect world, there would be a very high demand for these products. And so, you can't prove that what you've offered as the least restrictive means is effective unless there's very little demand. But I think, unfortunately, that that's not the case. I think that there is a substantial interest in what people might view as indecent material. There is a high market for it. And there may not be, unfortunately, a market for the higher-brow entertainment out there. And the question is whether we want government involved, and whether government can be involved constitutionally, in making those determinations.

And then the other question is, where do we put the burden? Do we put the burden on people to opt out or to opt in? I mean, it won't surprise any of you that I think people should have to opt out and not opt in. But I'll reserve the rest for more questions.

JUDGE SENTELLE: Robert.

MR. PETERS: I just have a point that I was going to make in my original, is that—I guess in the spirit of compromise, I do think that—well, I think there are two criteria. I'll backtrack a second; excuse me. Instead of trying to look at all the, you know, ins and outs of this media and that media, and the Court trying to find distinctions where, practically speaking, when you look at the governmental interests involved, there really aren't any distinctions. But, you know, judges can—excuse me—find such things when they don't exist.

But in terms of protecting kids, maintaining a decent society, you know, whatever, unconsenting adults, it seems to me that with kids in particular, you've got two things. Accessibility, looking at a medium, whether it's broadcasting, cable, satellite, cell phones, Internet—question, is it accessible to kids? And maybe more in particular, is all this bad stuff accessible to kids? And of course, that is almost always today an easy answer: the answer is yes.

And the other thing—was a choice made? Did a parent, in particular, choose specifically either to provide the kid with that particular access or choose specifically to bring that particular form of entertainment, whether it be a channel or whatever it would be, into their home? And I mean, I personally think that, short of very, very nasty sorts of entertainment, even when I would disagree with a parent, they have a right to bring HBO and Showtime into their home. I think they're crazy. I don't know how that would justify it, and I would be tempted to hold them liable if the kid got into trouble because of those channels. But I wouldn't put them in jail, and I wouldn't take their kids away.

So I mean, there are options. As with this multimedia—you know, it's interesting. On the one hand, we've got this explosion of media choices, and the minds of those who want to see *Pacifica* overturned: *Pacifica* is no longer unique. There's nothing; therefore, *Pacifica* should be overturned. But my point is, as we have more and more options for media, we have less and less excuse for having a Howard Stern on basic anything, broadcasting, cable, satellite. There are subscription channels on satellite radio.

Last point, when Opie and Anthony first went to satellite radio, they were on a subscription channel. If you wanted to listen to them as an adult, if you wanted to bring them into your home and have your kids listen to them, you could subscribe. I think it cost about an extra dollar a month. And in my opinion, that's where Opie and Anthony belong. That's where Howard Stern belongs. If Howard Stern were on a subscription channel on satellite radio, then for anything short of child pornography and obscenity, I

would say, “Howard Stern and everybody who thinks you’re a great guy, you can all go to the same place and be happy.”

JUDGE SENTELLE: I want to know where the place is that you would send our --

(Laughter.)

JUDGE SENTELLE: Roger, you spoke last, but perhaps there’s something you would like to add based on the remarks just made, or anything else this brings to mind.

DR. PILON: Well, you mentioned place, David, and I’ll start with that. The assumption here is that children are harmed by this. I know that was clear in Rob’s remarks, and I’m not so sure that that is the case.

I’m reminded of when my son and I went to South Beach in Miami and went running into the ocean and had a great time in the ocean, and as we were coming out, I watched his jaw drop. For those of you are unfamiliar, South Beach is a topless beach. I took it as an educational experience for him. He was eleven years old. And this is part of being a parent—talking with your kid and discussing the slings and arrows that he is going to run into, if he is at all living a life in the real world, as opposed to sheltered from everything.

But if your inclination is to shelter your children from this, and there’s nothing wrong with that with respect to a lot of this stuff, there is of course the V-Chip. But what is the experience with the V-Chip? Rarely is it used. And so the options are out there to opt out, and I don’t know why we need to push it any further than that because they are there. And I realize the programming of the V-Chip or whatever will require a little bit of technical dexterity. But that, too, is part of becoming a parent.

JUDGE SENTELLE: That gives us a good time for any of you who have any questions to approach one of the microphones and ask them. If you would, state your name before you give us your question.

Go ahead.

AUDIENCE PARTICIPANT: Thank you. My name is Alan Taylor. I was struck by, Adam, your comments. Unfortunately, Kevin, I’m sorry I arrived a little late. But the opt-out versus opt-in, that sounds like a pretty good way to look at this. South Beach is South Beach; it’s topless in South Beach. It’s not topless if you go down to the C&O Canal. I’m a parent of three, and if South Beach were everywhere, if that standard were

everywhere, which in many ways I think it has become in the media, it makes the job of parents like me very, very, very hard.

Particularly in the age of fatherless families, that's why V-Chips are not being used. It's unfortunate that the media, in my mind, is not doing a better job of doing what Daniel Patrick Moynihan –

JUDGE SENTELLE: Is there going to be a question in there somewhere?

AUDIENCE PARTICIPANT: Well, the question is why doesn't the media, if they believe in the issues, the concerns, that they don't want censorship, why don't they boost the programming that mainstream families support in the first place?

JUDGE SENTELLE: Is that directed at anybody in particular? If not, we'll start –

AUDIENCE PARTICIPANT: The comment regarding South Beach could be directed to Roger, and the comment on –

DR. PILON: Yeah, okay. I think that media enterprises are in the business of making money. And if there were more money to be made in the kind of programming you're talking about, we would see more of it. This is a problem that the movie industry constantly faces with the G-rated movies. They often or they sometimes do sell well, but other times they turn out not to. And so we come back to the economist's remark, there's no accounting for taste.

JUDGE SENTELLE: Probably we should hear from the most closely related to the media representative present, the VP of Time Warner.

MR. CIONGOLI: Let me be clear that I'm not here representing Time Warner. There is some correlation between Time Warner's interests and my own views, but these very much are my own views.

You know, I think Roger is right. Part of the problem here is that Americans need to stop buying it if they don't want it. If it wasn't selling, it wouldn't be produced. You know, to go to Rob's comment earlier about having the sort of Opie and Anthony subscription service, cable television is a subscription service. I work for a company that owns cable. I don't have cable. I don't want it in my house. I don't want it in my house –

MR. PETERS: I hope the reporters got that in the back of the room.

MR. CIONGOLI: No, but I don't want it in my house because I don't like watching television. I'd rather read or cook or spend time talking to my fiancée. People can exercise self-restraint, and that really for me is what it's all about. The law, ideally where the Constitution speaks, but moving past that from a policy perspective, the law should be creating incentives for people to take responsibility for their own actions.

AUDIENCE PARTICIPANT: Shouldn't the entertainment companies exercise self-restraint as well?

MR. CIONGOLI: Yeah, I think that people should generally exercise self-restraint. But I think if people weren't consuming particular entertainment, it wouldn't be for sale.

MR. PETERS: A quick comment. In the late eighties and early nineties, two federal courts upheld the indecency regulations regarding dial-a-porn. And the last time I checked, nobody is forced to have a telephone, and if you want to keep it, you have to pay a bill every month. So to me, the idea that you pay for cable every month, but a lot of people buy products to keep broadcasting on the air, has nothing to do with children, nothing whatsoever to do with protecting children. And today, eighty-five percent of the public get their broadcast channeled through cable and satellite. And some of the channels are regulated by indecency, and a whole bunch of the rest of them are not regulated for indecency. What justification? Because somebody pays a monthly bill? That's the rationale for the distinction? I don't see any distinction.

DR. PILON: But I believe that Adam is calling for self-regulation, and that is to say you can program your TV to exclude those channels you don't want on the TV.

MR. CIONGOLI: There are some people who think you shouldn't be allowed to have a firearm in your home if you have children there.

MR. PETERS: Well, you know, reject the 1968 Ginsberg, but in this case I think the Supreme Court got it right, that there are times when government has an interest in children, irrespective of whether the parent acts properly.

DR. PILON: I don't think either Adam or I are saying the government doesn't have an interest in children –

JUDGE SENTELLE: Chairman Martin, I want to let them battle a little, then let you speak. You keep trying over there.

DR. PILON: It just means –

CHAIRMAN MARTIN: Well, this is the problem that I have with what they mean. They want you to be allowed to opt out, but they still want you to have to pay for it. And there's a lot of discussion about the ease with which channels can be blocked, but of course the ease with which channels can be blocked only makes it easier to then say, why should you have to pay for channels that you don't want?

DR. PILON: Well now, that's a packaging problem, Kevin, and that's a matter of economic efficiency. They'll package it in such a way that they maximize profits, which is their perfect right to do. And if you want to tailor it, you know, it's like going in to buy a car and saying I want these kinds of wheels . . . and there may be some kind of configuration of a car they don't produce.

CHAIRMAN MARTIN: If I could respond, though, I think that this is where the concerns about the impact on families do make a difference, because when you're talking about the packaging and maximizing it for economic efficiency, that's when I think it becomes a concern about what the impact, then, is on children, because it's not that the families then are necessarily opting to purchase it. And that was actually, I think, Robert's point earlier, where he said when Opie and Anthony went to a pay-per-channel on satellite radio, that was perfectly appropriate. And as it turned out, I think they've been moved back now to the basic tier because no one subscribed to them when they were individually packaged. And there weren't enough subscriptions to justify the costs, when they were done individually.

And I think, I mean, I think the *Philadelphia Inquirer* got it right in an article recently when it said, cable TV's pricing structure is a bit like being told, if you want *Newsweek* and *Sports Illustrated*, that's fine, but you have to pay fifty dollars a month and take *Cosmo*, *Maxim*, *Easy Rider*, and *Guns and Ammo*. And you can always turn the television off, and you can block the channels you don't want. And you can also throw away more subscription magazines, but why should you have to?

MR. PETERS: Because that's the market, that's why.

JUDGE SENTELLE: Okay, I'm going to call that one the end of that question and ask a question, there on the left.

AUDIENCE PARTICIPANT: Hello. I'm David Mayer from Kaplan University in Columbus, Ohio. I noticed many of the panelists talked about the concept of the indecency itself, as well as the idea or the notion of certain things being "inappropriate for children," as if there were a consensus in our society about such things. But it seems to me that there is no such consensus; that people certainly have differing views, particularly when it comes to matters involving sexuality and other matters in which, even if there is a majority view in our country, it's a view that is changing because I think society is continually evolving.

One of the reasons we have a First Amendment is to, as the old saying goes, protect the sort of minority views, unusual views, and expressions that don't fit within sort of the mainstream from being excluded from a marketplace by –

JUDGE SENTELLE: Dan, are you going to come to a question mark?

AUDIENCE PARTICIPANT: Well, the question is, it seems that government regulation, content-based regulation, raises a danger even more inimical to majority tyranny, and that is the danger of minority tyranny. In other words, particular –

JUDGE SENTELLE: That –

AUDIENCE PARTICIPANT: – groups that are offended at particular kinds of speech seem to have greater influence over FCC rulemaking and over Congress than even the majority views of society. How can that be squared with the First Amendment?

MR. PETERS: Again, I don't know if you were here for my opinion, the, not public indecency, but broadcast indecency law has its genesis in public indecency laws. And I think every state has them. That probably should give you some sense of whether the public wants people running around naked in public places and telling dirty jokes to their kids and fondling themselves and others in front of their children, things like that. They don't. They don't want to see it in a public street; they don't want to

see it in a public park; and they don't want their kids to turn on the television at home or the computer and see it there.

And the last point there would be, if you look at the opinion polls, consistently a majority of the American people express both offense and concern. And when the poll is limited to parents, it gets into the range of ninety percent of parents who are concerned about the effect of this stuff on their kids.

DR. PILON: At least until the kids go to bed.

AUDIENCE PARTICIPANT: Michael McDermott, mens' civil rights attorney from California.

JUDGE SENTELLE: Well, I'm not sure if we have any comments to the last question from over here.

(No response.)

JUDGE SENTELLE: Okay, go ahead.

AUDIENCE PARTICIPANT: Michael McDermott, mens' civil rights attorney from California. I'd like to get the panel's sense of the effect on the so-called indecency laws of the Court rulings in the *Extreme Associates* case, which seems to bear out the worst warnings of Justice Scalia from the *Lawrence v. Texas* decision. Are you familiar with *Extreme Associates*?

DR. PILON: I anticipate that at this point, the Supreme Court will not affirm that decision. The Third Circuit might, but if the Supreme Court has good sense, it won't do it at this time, certainly.

JUDGE SENTELLE: I'm going to ask either the panelist or the questioner to state what that case held.

DR. PILON: Is that California versus Pennsylvania? Isn't that the California couple in Pennsylvania?

AUDIENCE PARTICIPANT: *Extreme Associates*?

DR. PILON: Yeah.

AUDIENCE PARTICIPANT: No, it's movies that depict violent rape on –

MR. PETERS: Yeah, that's right, but they're a California couple and they're being held to the standards of Western Pennsylvania, and being prosecuted under those standards.

AUDIENCE PARTICIPANT: But they've won so far.

DR. PILON: Yeah, that's right. Community standards is a . . . criterion that's used to nationalize the issue, and therefore intrude upon the rights of people in New York and California to be as perverse as they want to be, as they tend to want to be.

JUDGE SENTELLE: Any comments from the table?
(No response.)

JUDGE SENTELLE: All right.

AUDIENCE PARTICIPANT: Hello. Sean Gallagher, Washington, D.C. First, I wanted to answer Roger as to the question whether anybody's hurt with this.

DR. PILON: No, that's not what I said, whether any rights are violated. After all, businesses that drive me out of business hurt me, but they don't violate my rights.

AUDIENCE PARTICIPANT: Well, let me just say that there are people addicted to this, and that addiction has a high correlation, at least the sexual abusers that seem to be high consumers of this. I think Mr. Peters hit the mark on the head when he said that as long as we consider pornography of equal protection as political speech and original First Amendment, then it will never be narrow enough, but I would just say that –

JUDGE SENTELLE: Is this going to morph into a question somewhere?

AUDIENCE PARTICIPANT: Yes. It seems like the crux of the issue, at least for now while we have strict scrutiny, is opt-in versus opt-out. If we had an opt-in rather than opt-out, it would protect a lot more people. Could I hear your views on that?

DR. PILON: Let me respond to the first part of your question or comment, and that is that there are some people who seem to be addicted to pornography, and that is to say that there is a correlation alleged between watching pornography and going out and committing rape or some other sexual crime. First of all, that would allow the equivalent of the hecklers' veto. That is to say, one person or a few people who are so addicted could stop the rest of the society that happens to enjoy this material, for whatever reason, from doing so.

Secondly, it is a very impoverished view of the human being, invoking a stimulus-response model whereby the stimulus generates the response with no choice intervening, which is of course the mark of the human being, to have choice. And if we are dealing with people like this, the issue is not to cut off the stimulation, but rather to prosecute them for the crimes they commit and put them away for as long as need be for that crime.

Now the question part was what?

MR. PETERS: I have to get one comment on the opt-in and opt-out. I don't care what the issue is. Clearly, it's almost like a 180-degree opposite; if ten opt in, you reverse it and it goes the opposite. So clearly, if we want to protect kids, the best way to protect them is to have adults who want to access entertainment that is not suitable for children to choose it, to bring it into their home one way or another. They make the choice; not necessarily to have to pay extra, they just have to do something to show that they are eighteen and over. And that's the best way to protect kids. And there are more and more channels for that to take place. And if nobody wants to pay and sign their name to hear Opie and Anthony, maybe that's an indication that Opie and Anthony aren't as popular as Infinity, I think, thought they were. Or was it Clear Channel?

CHAIRMAN MARTIN: Well, I think it's about line-drawing. If you really want to talk about kids, you could hold parents criminally liable for allowing them access to this. And you said you weren't willing to do that, but that would really protect kids.

MR. PETERS: Well, in some circumstances I think I would, but I don't think that's necessarily a great answer either.

CHAIRMAN MARTIN: But why not in all circumstances? If the goal is to really protect kids, is this interest that compelling? Then we just get rid of their least restrictive means aspect of strict scrutiny.

MR. PETERS: The least restrictive effective means. I think the courts—that's what upheld the dial-a-porn regulations. The rule was least restrictive effective means. Now, Justice Kennedy and company have conveniently omitted the word "effective," so they just looked, is this the least restrictive means? Yes, it is. Does that work? We don't care.

MR. CIONGOLI: Well, Justice Kennedy joined by Justice Thomas, actually, who didn't excise it entirely. They said that the burden is on the government to prove sort of why it's not working, and the government could carry that burden in the *Playboy* case.

MR. PETERS: If you look at the surveys, by about the eighth grade, every child in many parts of the country has seen pornography on the Internet. What more proof does Justice Kennedy and the four justices who agree with him want? What kids are accessing pornography over the Internet? What can the government do to prove to Justice Kennedy that kids are accessing pornography on the Internet? Does anybody in here deny that?

JUDGE SENTELLE: I'm going back to the moderator's role, and moderated by having somebody else (inaudible).

DR. PILON: This opt-in/opt-out is an intriguing idea, and if you think about it with respect to magazines, what we have had is an opt-in. You get *Playboy* by buying it, right? And it's sent in a brown paper wrapper to your home. But this is not going to satisfy the other side; it's not because now I go back to the extreme what is it called, case?

MR. PETERS: That's obscenity.

JUDGE SENTELLE: *Extreme Associates.*

DR. PILON: No, this is, we're talking about the Federalist Society's own Mary Beth Buchanan, who's the U.S. attorney in Pittsburgh. This is relating to adults. This isn't children, now. This is obscenity being bought over the Internet and sent in a brown paper wrapper, presumably, to the home, adult to adult. This isn't children. So in other words, these people are going after—this is Gonzalez's new task force—they're going after pornography, not just the light stuff. And the fine, by the way, for sending this material turns out it's fifty years in prison, a \$2.5 million fine, and we

don't send rapists to jail for fifty years. You know, what this is, is a crusade, if I may put it in those terms.

JUDGE SENTELLE: Chairman Martin, any comment?

CHAIRMAN MARTIN: Well, obviously, I think that opt-in is a method of protecting children more than opt-out. But in many ways, I think that the question is not even opt-in versus opt-out because in many ways the industry doesn't want to give either choice. And I go back to, they say you can opt out but you still have to pay. And they say the reason you still have to pay is because if you allowed everyone to opt out, too many people might not subscribe to the programming, and then it might not be economical to produce it. And I think that –

DR. PILON: Can I –

CHAIRMAN MARTIN: If I could finish—and I think that the opt-out regime that people advocate might fully address it. But then I think there needs to be the opportunity for someone to say, “I don't want that programming and I don't want to pay for it anymore.”

DR. PILON: Kevin, you can't go into the Cadillac dealership and say I want to opt out of the air conditioning. They just don't offer the model.

CHAIRMAN MARTIN: You know, but in the magazine example you gave, you can buy individual subscriptions.

DR. PILON: Well, sure, but that's an individual transaction involving an individual magazine. We're talking about –

CHAIRMAN MARTIN: Yes, it's packaging that, as I understood, Adam said don't worry about packaging because the technology now is easily available to block whatever you don't want.

DR. PILON: Yes, you would like the government to be able to order General Motors to sell a Cadillac without air conditioning because there are some people out there who don't want to pay for the air conditioning.

CHAIRMAN MARTIN: No, what I wanted to say is that since they are saying that it's easy to order it without the air conditioning, if they order it without the air conditioning, don't make them pay for it.

(Applause.)

DR. PILON: They can't order it without air conditioning. That's the point. It's not made –

CHAIRMAN MARTIN: Yes, but Adam is saying, don't worry; you can order it without air conditioning. And I'm saying, if you order it without air conditioning, why should you have to pay for the air conditioning you didn't order?

MR. CIONGOLI: What I'm saying is, you can order it with air conditioning, but you don't have to turn the air conditioning on.

DR. PILON: There you go. There's a difference.

CHAIRMAN MARTIN: But you do have to pay for it.

MR. CIONGOLI: Yes, because we're producing it with an air conditioner.

JUDGE SENTELLE: We have that point well made, and we'll call on another question.

MR. PETERS: One quick—to be perfectly—

JUDGE SENTELLE: We almost had that point well made.

MR. PETERS: It scrambles my brain a little bit, but it amazes me that after all these years, I think about fifty percent of parents use screening technology on the home computers. That to me just boggles my mind, but that's the reality.

JUDGE SENTELLE: Okay, I thought we had it well made. Another question.

DR. PILON: But how would you find the good sites, if you—that's what the kids are for.

MR. PETERS: The question is does the government have an interest to protect children from parents who, for whatever reasons, don't do the job, and I don't think they do.

AUDIENCE PARTICIPANT: My name is Stu Nolan, and I'm with Wood Maines & Nolan, a broadcast law practice here in D.C. Two quick questions. First of all, the theme of this convention is originalism, and is there any feeling by any of the panelists that a case can be made that when the First Amendment was ratified, it was intended to cover most of the garbage that we're subjected to in the media right now? And secondarily, there seems to be this prevailing notion of opt-in and opt-out, which implies that people who want to opt out of objectionable programming sort of just have to go live in a cloistered society by themselves.

But leaving that point aside, how do you opt out—in a practical way—of commercials, which even in semi-good programming, are just terrible; I mean, just very offensive, objectionable material, now prevalent in the commercial matter.

DR. PILON: The first answer is ask Ben Franklin.

MR. PETERS:

I would suggest reading the *Chaplinsky* case and *Near v. Minnesota*. I think they go into the First Amendment, and I think it's clear that obscenity and indecency weren't something that was in mind with our founding fathers.

MR. CIONGOLI: If we're going to really get to originalism, I also would advocate that we go back to *Gibbons v. Ogden*, in the context of the Commerce Clause, and therefore restrict Congress's ability to regulate anything substantially.

JUDGE SENTELLE: There's something to be said for that. Did you intend that to be a parade of horrors? It sounded pretty good.

Kevin.

CHAIRMAN MARTIN: I don't have anything.

AUDIENCE PARTICIPANT: I'm Steven Yelberts, a country lawyer from North Carolina, but I've been stranded in Washington, D.C., probably for too long.

I'd like to raise another aspect of this issue, and that's the perspective of broadcasters. I represent broadcast stations before the FCC. And many of the clients I have have a policy decision not to broadcast anything to be considered indecent. And the problem they have is competition with other stations that do have indecent programming. And indecent programming—sex, violence, indecency—gets ratings and it sells. And so I'd like to throw the question out to the panelists, of indecency regulation as a form of economic regulation to maintain a level playing field for the broadcast stations and to prevent what many consider unfair competition.

Under current FCC regulations, indecent programming has to be after ten o'clock when there are not any ratings, so if everybody has programming during the rating periods, that's not considered indecent, they're on the same level playing field. So I throw that question out. Is this really economic regulation?

JUDGE SENTELLE: Right table.

MR. CIONGOLI: Well certainly, I don't think that the indecency regulations can't have an economic impact. I mean, there's certainly no question that broadcasters have been making filings with the Commission for a long time, saying they're adversely impacted by the programming that's on the cable channel right beside them. But it's not economic regulation in the sense of the way that the Commission talks about economic regulation. It doesn't mean it doesn't have an impact. But it's not economic regulation in terms of pricing regulation, barriers to entry; you've got to receive a state certificate or you've got to do pre-pricing beforehand. So in that sense, it may have an economic impact, but it's not economic regulation.

JUDGE SENTELLE: Any further comment?

DR. PILON: Well, the complaint seems to be that the other station is putting on stuff that sells. I mean, you know, I'm not very sympathetic to that complaint. If I'm trying to sell the opera and this guy next door is broadcasting NASCAR, to put it in local terms, and you know, he's going to get the audience and I'm not, because opera, other than Grand Ole Opry, doesn't sell in North Carolina.

MR. PETERS: Well, it would be a little bit like the old broadcast code. If before they abandon the code, one of the networks decided not to comply with the code, obviously there'd be an audience for what would

take place afterwards. But that gets back to maybe the FCC being tougher on the people who are breaking the law.

JUDGE SENTELLE: There's none over here now, so another question from over here.

AUDIENCE PARTICIPANT: Good afternoon. Jason Wynn, student volunteer from the University of Miami. I wanted to focus on, for a second, something that was brought up by Adam and Roger specifically with respect to the narrowest means. Adam continues to point out that the V-Chip, you know, is probably the narrowest means, and Robert continues to point out that it's ineffective. But where I'd diverge is that Robert is saying it's ineffective, let's move on to something more, you know, content-restrictive. Wouldn't it be more meaningful to make the narrowest means more effective, and then how can you do that? How can you promote—shouldn't the role be, we're not going to take away the content, but we are going to make it so that the parents are going to know these options and actually use them? Because that's what's making it ineffective, not that the technology doesn't work, but that nobody knows how to use it but the kids.

MR. PETERS: Well, I got in trouble for this answer once. But I think twenty-five percent of New York kids have parents who don't speak English. It's not just limited to one language. So for a variety of reasons, I don't care what you do; some parents, many parents, are not going to use technology. They're just never going to do it. That's the reality. That's the world in which we live.

You know, I was at a seminar yesterday, and an African-American woman, toward the end, because there was a lot of talk about parents; much of it was, you know, on getting parents. And she made the point that in today's world, a lot of children don't have a parent at home—grandparents, one parent, problems. But that's life.

You live in Washington, D.C., many of you do. I live in New York City. I don't think we have to be told that many children don't have parents who are going to program the computers and the cable system, and now the cell phone. It just isn't going to happen.

DR. PILON: But the instructions come in multi-language.

MR. PETERS: Yes, they do.

DR. PILON: You know, French, Portuguese, Chinese, Japanese, Spanish, of course, and even English.

MR. PETERS: During the dial-a-porn, I did—there was the incredible amount of publicity on dial-a-porn. Nobody can tell me that parents wanted their children to call up on the phone, at their expense, and listen to dial-a-porn. But after all the publicity about dial-a-porn, I think that five percent of New York—and there are more families in New York than five percent of the population—had signed up to block. And then, of course, it turned out that what they blocked was inadequate anyway because the dial-a-porn people figured out ways to get around the exchanges. But only five percent. And it got a tremendous amount of publicity in New York. You know, newspaper articles, TV.

JUDGE SENTELLE: Well, that was the ultimate opt-in. You don't get it unless you dial it, or something like that.

DR. PILON: That's right, and you know, you find it on your bill.

MR. PETERS: That's the old, the parent discovers it after, you know, in some cases what the kids would do is they would just tear up the bill for a couple of months. Eventually, dad and mom would figure it out.

JUDGE SENTELLE: Yeah, about the time they cut their phone service off.

Other table.

MR. CIONGOLI: There are some things that could be done to make the V-Chip more effective. For example, the ratings system is confusing to most of the parents. Instead of following the movie rating system, which is pretty generally understood and accepted, there was a separate rating system that was created for television that was different. And I think that created some confusion. So I think there are some things that, practically, could be done to try to improve its effectiveness.

DR. PILON: Yeah, and that's what I testified on a couple of years ago, was the ratings system. Of course, nobody could agree on what the ratings system should be. And it had to cover everything from movies to TV to radio to CDs to videogames, and so on and so forth. And you know, by the time, it was Connecticut Senator Lieberman who got it through,

because he was all for this rating—he himself noted that there was some difficulty there.

JUDGE SENTELLE: All right. Somebody else is not at a microphone over here.

AUDIENCE PARTICIPANT: If you want to get your kid a computer and you don't want him to see unsuitable material, how do you work that out?

MR. CIONGOLI: Buy AOL.
I couldn't resist.

JUDGE SENTELLE: Over here.

AUDIENCE PARTICIPANT: Robert Hancock. I've got a two-part question. One, if we grant, for the sake of argument, that government does have an interest in stepping in where parents fail with respect to kind of what we've been talking about today, do we think that the FCC, which is very far removed from the everyday experience of parents, is the best agency to step in and in effect, in absentia, raise children? And two, where does the government's interest in poor parenting end? It's very simple to attach constitutional import to, you know, four-year-olds watching pornography, but there are plenty of other areas where we could step in and say that parents are not doing their job, where many of the same people on the right —

JUDGE SENTELLE: Okay, none of those are before this panel. Your question for this panel was, is the FCC the best forum for the regulation of parental guidance on this area.

Kevin.

CHAIRMAN MARTIN: I guess I would say, I don't know. I know that Congress required us to be the agency to look at it. And Congress said that one of the government agencies was, and the one that they selected, was the Commission. And so, you know, we struggle with that as what we're required to do.

DR. PILON: Just doing my job, huh? The issue that Robert's raising is a very important one, and that is: There's no reason why those organizations, and there are plenty of them, and they're large and well-

funded, who are interested in the issue, cannot as a private matter get together and do the rating themselves and provide it. There's no reason why the government has to do this rating. It is –

CHAIRMAN MARTIN: The government doesn't do the rating. It is not the government who does any of the rating systems.

DR. PILON: Well, the government, well, okay. Fair enough.

CHAIRMAN MARTIN: The government doesn't do that right now. The FCC's only role is on the indecency enforcement, when someone files a complaint in front of us that something violated our rule on indecency. But the rating systems that people are talking about, the government doesn't do the rating themselves. That's done through the private sector consortiums. But that's not the government doing them.

DR. PILON: Well, that's good to hear that there is something the government doesn't do.

JUDGE SENTELLE: Adam or Robert?

(No response.)

JUDGE SENTELLE: Back to the other microphone. We're getting close to the end.

AUDIENCE PARTICIPANT: All right. The AOL comment got me back up. I've been a subscriber for about ten years, and it is one of the most heavily biased, politically censored groups around. My question for you, when AOL, which used to have a men's interests section and a women's interests section, deliberately destroyed the men's section and kept the women's section growing, was that because of indecency considerations, or was there some other political decision at work to disenfranchise male subscribers?

MR. CIONGOLI: I think this is going to be a nonresponsive answer. I'm not familiar with that decision. I was largely joking. But what I would point out is that one of the major selling points of AOL, and I know the reason that my parents have AOL at home, is because it does have pretty substantial parental controls. I have a brother who's sixteen years younger than I am, who is very tech savvy. And my parents were very interested in

making sure that he not look at certain things, and I think that's the way that it should operate.

MR. PETERS: One point. I attended a seminar yesterday on cell phones. You know, seventy percent penetration of the population, no pun intended, but you know, even if a parent uses screening technology, they get AOL, great. And once the kid leaves the home, all it's going to take is one kid that has access to the Internet through the cell phone. And according to the cell phone companies, they are not going to regulate the Internet. So, we're going to be back to step one. Even if every parent used it in the home, or most of them, you've got this whole world of cell phones that provide access to the Internet.

JUDGE SENTELLE: If it does it as slowly as mine does, it's not going to hurt anything.

One more question. I don't mind going over a little because we got started late, but we won't go over very much.

Go ahead. One more question.

AUDIENCE PARTICIPANT: Hi. I'm David Chifron, a third-year student at Penn Law. My question is for Chairman Martin. You've mentioned that you feel that the issue is that cable companies are bundling rather than, you know, rather than giving consumers the option of getting channels à la carte. Don't you think that this is a product of the fact that there really is no competition in the cable market within a given geographic area? For instance, I live in New York City. You know, I have one option for cable, which is Time Warner cable, which, yes, Adam, it's a great service. But the thing is that, for instance, they do not offer the Robert Peters Package of Weather Channel, Fox Family Channel, and 700 Club, and no other stations. Whereas, if they had multiple providers, I could go to one that offers that particular package or, you know, one that offers consumers the ability to choose their own channels.

CHAIRMAN MARTIN: I think that there certainly is some competition in some areas on the video subscription because, of course, you've got satellite being an option in some places. But that's not an option in others because, for example, it's very hard to provide that service in urban areas. It can be more difficult at times to provide that. But there is some competition.

But that is an important distinction, and the more competition you have on the distribution side, the easier it is to say that the distributors themselves will find a way to package and address the content issues we've

been discussing. But there are a limited number of distributors of multichannel video programming today. And indeed, some of those other distributors are also vertically integrated and can own some of the content themselves, as well, which can also further complicate whether or not there would be distributors who would offer different kinds of packages without including some of that content.

So, I think that you're right that some of the competitive issues do have an impact on these concerns as well.

JUDGE SENTELLE: Okay. Unless somebody else has some further comment on that question, we're going to call a halt to this panel. Thank the panelists. Thank you.

(Panel concluded.)