

## PANEL DISCUSSION AND COMMENTARY<sup>†</sup>

**Congressman Franks:** This panel discussion will focus on Internet regulation. Let me begin by offering my legislative perspective and noting that although Congress has passed several acts over the last few years aimed at regulating content on the Internet for the ostensible purpose of protecting children, we have not had a very good record in the courts.<sup>1</sup> How then do we regulate content without offending the Constitution? I also pose this question to you: How much influence or weight should parents' rights be afforded in this analysis, whether we are discussing the Internet, radio, or film? We will begin with you, Professor Candeub.

**Professor Candeub:** Congressman Franks is quite right. The content regulation of the Internet has had an unsuccessful record before the Supreme Court. It's a real challenge for parents who want to control what their children do on the net. Beyond the legality of the indecency regulation, I tend to look at it in terms of cost. How expensive is it as a parent to control your child's environment? And to produce the sort of environment that you want?

We have neighbors who have taken a different approach: they homeschool; they don't have television (except for DVDs); and they have a more circumscribed social environment that revolves largely around church. That's one solution—or rather possibility—and must factor into the equation. Do we want a society in which the popular culture is so difficult to control and so offensive to so many that you have people

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<sup>†</sup> This panel discussion was presented as part of the Regent University Law Review and The Federalist Society for Law & Public Policy Studies Media and the Law Symposium at Regent University School of Law, October 9–10, 2009. The panelists discussed issues involving government regulation of media sources. Panelists included: Marvin Ammori, Assistant Professor, University of Nebraska-Lincoln College of Law, and former General Counsel, Free Press; Adam Candeub, Assistant Professor, Michigan State University College of Law; Christine A. Corcos, Associate Professor, Louisiana State University Law Center, and Associate Professor of Women's and Gender Studies, Louisiana State University; Patrick M. Garry, Professor, University of South Dakota School of Law, and Director, Hagemann Center for Legal & Public Policy Research; and Lili Levi, Professor, University of Miami School of Law. The panel was moderated by Congressman Trent Franks, Second Congressional District of Arizona.

<sup>1</sup> *E.g.*, Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, div. A, tit. I, § 121(2), 110 Stat. 3009-26, 3009-27 to -28 (codified as amended at 18 U.S.C. § 2256 (2006)), *invalidated in part by* Ashcroft v. Free Speech Coal., 535 U.S. 234, 239, 258 (2002); Communications Decency Act of 1996 § 502, 47 U.S.C. § 223 (Supp. II 1994), *invalidated in part by* Reno v. ACLU, 521 U.S. 844, 849, 874, 885 (1997); *Id.* § 505, 47 U.S.C. § 561 (Supp. III 1994), *invalidated by* United States v. Playboy Entm't Group, 529 U.S. 803, 806, 827 (2000); Child Online Protection Act of 1998, 47 U.S.C. § 231 (2006), *invalidated by* ACLU v. Mukasey, 534 F.3d 181, 207 (3d Cir. 2008).

withdrawing from it? That is an issue requiring serious consideration.

**Professor Levi:** The FCC justifies some of its content regulations—such as indecency regulation—by reference to two interests: the state’s desire to promote parental control and its independent interest in the welfare of children.<sup>2</sup> Not all parents are going to have the same views about what their children should or should not be exposed to. Under those circumstances, what FCC rule could adequately satisfy its goal of supporting parents? Allowing parents who find certain content offensive to make it unavailable to those who do not tilts too far in one direction. Maybe the best approach is to allow parents the possibility to “opt out.”

Regardless, governmental regulation may be overshadowed at this point by nongovernmental censorship, as already mentioned by Professor Corcos. Nongovernmental censorship may well be more effective than government efforts, which must satisfy constitutional requirements. When Internet service providers control access and filters,<sup>3</sup> and when television networks engage in private censorship through their standards and practices departments,<sup>4</sup> Congress need not do much more.

**Professor Ammori:** I feel like there is no ideal solution to the question. Essentially, there are trade-offs and two or three bad solutions, and you have to choose the least “bad” of them. In our imperfect world, that is essentially what we do whenever we make policy. One bad solution is to have government pass a law making certain kinds of online speech illegal. And those laws have been struck down. And when you read those laws and cases you know it’s very hard to write a law that doesn’t ban *Romeo and Juliet*—an example used by the Court<sup>5</sup>—or

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<sup>2</sup> *Action for Children’s Television v. FCC*, 58 F.3d 654, 660–61 (D.C. Cir. 1995) (“The Commission identifies three compelling Government interests as justifying the regulation of broadcast indecency: support for parental supervision of children, a concern for children’s well-being, and the protection of the home against intrusion by offensive broadcasts. Because we find the first two sufficient to support such regulation, we will not address the third.”); *see also FCC v. Pacifica Found.*, 438 U.S. 726, 757–58 (1978) (Powell, J., concurring) (recognizing validity of dual government interests in assisting parents and protecting children); *Ginsberg v. New York*, 390 U.S. 629, 639–40 (1968) (same).

<sup>3</sup> *E.g.*, Elizabeth M. Glazer, *Seeing It, Knowing It*, 104 NW. U. L. REV. COLLOQUY 217, 221 (2009) (noting that Google, the Internet search engine, filters certain types of content more strictly).

<sup>4</sup> *See* Michael Botein & Dariusz Adamski, *The FCC’s New Indecency Enforcement Policy and Its European Counterparts: A Cautionary Tale*, 15 MEDIA L. & POL’Y 7, 13 (2005) (describing the role of standards and practices departments in limiting indecency on the air).

<sup>5</sup> *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 247 (2002) (recognizing that Shakespeare’s play *Romeo and Juliet* has inspired various modern adaptations, and the fact that they may contain sexually explicit scenes is not enough, in itself, to justify the conclusion that the work was obscene).

advocacy websites addressing AIDS awareness. So when you read the law, it looks like it is overbroad, and you run into discriminatory enforcement by government or state agents who harass some groups but not others. That's the real problem—the state having discretion to regulate Internet speech.

But if we leave it entirely in the parents' hands, it is also difficult—there are few website-blocking technologies that are capable of adequately protecting your children unless you are sitting next to them in front of the computer screen,<sup>6</sup> which would be a hassle, and a full-time job.

I think laws like network neutrality would make it easier for developers to design technology that can block and be easily programmed by parents; if you are asking the government or the Internet service provider to figure out how to block websites, or to determine which websites are bad, you're going to have a lot less innovation in these blocking technologies and a lot less choice for parents. You won't have a free market of technologies amongst which parents as consumers can choose based on their different wants and needs.

**Professor Garry:** I'll build on what Professor Ammori just said. We want individual choice and freedom, but we must be wary of the inherent dangers of media outlets such as the Internet; indeed, I have written on the idea that because the media has become so monopolistic, the voice of the people has been stifled.<sup>7</sup> The Internet has almost fulfilled the potential of the old eighteenth century pamphleteering, which in times past allowed the people's voice to be heard. But the Internet presents some horrible dangers.

It is an interesting question that Congressman Franks poses in terms of the rights of parents because it is beyond question that parents do have the right to control the upbringing of their children.<sup>8</sup> But they are in a tough position. We don't want them to "opt out," as Professor Levi stated; why would we want them to? We make fun of them if they opt out because such behavior marginalizes those parents.

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<sup>6</sup> See generally CHERYL B. PRESTON, CP80 FOUND., WHY FILTERS ARE NOT THE ANSWER (2006), available at [http://www.cp80.org/resources/0000/0019/Why\\_Filters\\_are\\_Not\\_the\\_Answer\\_-\\_The\\_CP80\\_Foundation.pdf](http://www.cp80.org/resources/0000/0019/Why_Filters_are_Not_the_Answer_-_The_CP80_Foundation.pdf) (discussing the inefficacy of Internet filters alone as a mechanism to protect children from online pornographic material). *But see* ACLU v. Gonzales, 478 F. Supp. 2d 775, 795 (E.D. Pa. 2007) (finding that "filters generally block about 95% of sexually explicit material").

<sup>7</sup> See Patrick M. Garry, The First Amendment in a Time of Media Proliferation: Does Freedom of Speech Entail a Private Right to Censor?, 65 U. PITT. L. REV. 183, 223–24 (2004).

<sup>8</sup> *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925).

Let's examine, for instance, the plight of poor families. They work to put a computer with Internet access in their home to aid their children's education, but they must then worry about what their children will see and have access to on that computer. So now they're going to have to find a way to block all of that, which is yet another financial burden.

*ACLU v. Reno* was educational for the Court; it was really the first Internet regulation case before the Court, and the treatment of the Internet was rather naïve.<sup>9</sup> They thought it was a wonderful medium with readily accessible information that made it nearly impossible for children—with their limited knowledge—to access harmful material. Well, by the time *United States v. American Library Association* came around, the Court came to a different conclusion.<sup>10</sup> They began citing surveys and studies in which kids had “accidentally” come across material their parents did not wish them to see.<sup>11</sup> Clearly, the Internet is a very difficult medium for parents to control day-to-day, minute-by-minute.<sup>12</sup>

The danger the Internet presents is a legitimate concern. I think most of what Congress has done up to this point has been ineffective to solve the problem because censoring the entire medium is impossible. I think there is also the concern that we can't treat the Internet as if it were a freely accessible public park and then expect all the users to simply turn away from it when they don't like what they see.

There's really only one scheme I've seen that's been proposed in terms of Internet regulation, and that is one in which people have a choice.<sup>13</sup> But we also have to realize that there's a choice not only to access information, but to avoid information. One proposal I've seen is not to try to regulate the Internet; instead, it involves making use of the

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<sup>9</sup> See *Reno v. ACLU*, 521 U.S. 844, 849–57 (1997) (describing even the most fundamental aspects of Internet composition and navigation, and adhering to the view that sexually explicit material is rarely stumbled upon accidentally).

<sup>10</sup> 539 U.S. 194, 200 (2003). The Court noted:

[T]here is . . . an enormous amount of pornography on the Internet, much of which is easily obtained. The accessibility of this material has created serious problems for libraries, which have found that patrons of all ages, including minors, regularly search for online pornography. Some patrons also expose others to pornographic images by leaving them displayed on Internet terminals or printed at library printers.

*Id.* (citations omitted).

<sup>11</sup> *Id.*

<sup>12</sup> *Ashcroft v. ACLU*, 542 U.S. 656, 685 (2004) (Breyer, J., dissenting) (recognizing that at least five million children are left unsupervised each week while their parents work and thus may have unrestrained access to a computer).

<sup>13</sup> See, e.g., Cheryl B. Preston, *Zoning the Internet: A New Approach to Protecting Children Online*, 2007 BYU L. REV. 1417, 1426–27 [hereinafter Preston, *Zoning the Internet*] (promoting a “Ports Concept” that allows the end-user to select those Internet ports that will be allowed into his or her home).

many ports on the Internet.<sup>14</sup> For instance, you make a certain port—like an HTTP—a type of family-friendly port, and that becomes the default port.<sup>15</sup>

If I want any other port, then I can go ahead and ask for that kind of port. If you separate it by ports, you don't have to worry about filtering problems. It's a good way to be able to keep out what you don't want and then on any other port you can have absolutely anything you want, which gives parents both control and choice.<sup>16</sup>

**Professor Corcos:** I also think this is a really difficult situation precisely because parents do want to and should monitor what information their children are exposed to when they are young. But children grow up; we were all children once. Children grow, and we expect them to mature. And we expect them to make choices. And as I was discussing with several of you right before this part of the symposium started, we expect them at eighteen to take on the responsibilities of adults. Yet that isn't something that happens overnight. To prepare, they need to start making intelligent choices during that continuum from adolescence to adulthood. Parents need to keep those lines of communication open during that very significant period before children turn eighteen, and part of that is talking to them about the choices that they make about books, television, friends, driving cars responsibly, and about places they go on the Internet.

Advocating regulation of the Internet is not something that I would favor lightly. I like Professor Ammori's suggestion that companies can promote and develop products that parents could choose to help them guide their children.<sup>17</sup> Another choice is for parents to simply turn off the computer. Or, parents could put the computer in a room other than the child's bedroom. You monitor just the way you monitor television viewing. Not all parents can do it; not all parents have time to do it. But I think we have to re-engage with what our children are doing in the time that we have them under our supervision so that when we're not around them, we can be a little more certain of what it is that they're doing when they're with their friends or other adults. And maybe they will make the choices that we want them to make when we're not around. I know it's not a simple question. But that's all the wisdom I have.

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<sup>14</sup> *Id.* at 1426–35.

<sup>15</sup> Cheryl B. Preston, *Making Family-Friendly Internet a Reality: The Internet Community Ports Act*, 2007 BYU L. REV. 1471, 1475–76 (2007).

<sup>16</sup> *See id.*

<sup>17</sup> *Cf. Shea ex rel. Am. Reporter v. Reno*, 930 F. Supp. 916, 931–32 (S.D.N.Y. 1996) (recognizing myriad available filtering and blocking systems).

**Congressman Franks:** Maybe we can shift to access to the Internet. It's already been pretty well demonstrated that Congress has a hard time catching up to and regulating new media. There is even the suggestion now that the \$7.2 billion American Recovery and Reinvestment Act<sup>18</sup>—the stimulus package—be used as a vehicle for regulation for broadband in rural areas. This speaks to Professor Ammori's premise of net neutrality.

Many members of Congress—including me—do not completely understand that issue, but it seems to focus on equality of access.<sup>19</sup> Should speed of access by the consumer be based upon the ability of the privately owned site to pay more or less for that speed? Some of us have to go back to the original break-up of Ma Bell as an example.<sup>20</sup> The government controlled Ma Bell—a private company—in a big way until we broke it up, allowing people to have their own networks, which in the long run gave the underserved more access.<sup>21</sup>

The question then comes down to this: Is it better for government to control the access mechanism of the Internet, or is it better for government to allow those who own different parts of the network to let the market control access? Which option will have the most effect on giving additional access to private individuals who may not be able to pay for the faster pipes that major companies can afford?

**Professor Candeub:** The question is remarkably complex. Professor Ammori and I probably have different ideas on the way networks work right now. It's currently not neutral in many deep ways. Discrimination happens in very technical ways in various parts of the net right now. So it's difficult to create one rule or figure out what that rule would be and then leave it to the Federal Communications Commission ("FCC") to define it, because you'll end up with what you had under the most recent telecommunications regulation—the Telecommunications Act of 1996 ("TCA")—which was a confusing mess

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<sup>18</sup> American Recovery and Reinvestment Act of 2009, Pub. L. 111-5, div. A, tits. I–II, 123 Stat. 115, 118, 128.

<sup>19</sup> See generally Shane Lunceford, *Network Neutrality: A Pipe Nightmare*, 17 U. BALT. INTELL. PROP. L.J. 25 (2008) (discussing Internet traffic amongst various "pipes" and the policy reasons to promote legislation on net neutrality that regulates behavior rather than outlawing certain uses of technology).

<sup>20</sup> "Ma Bell" was a colloquial term used to describe the phone-service monopoly held by AT&T until its break-up in 1984. BARBARA J. ETZEL, WEBSTER'S NEW WORLD FINANCE AND INVESTMENT DICTIONARY 203 (2003); 1 THE NEW ENCYCLOPÆDIA (15th ed. 2007); see also AT&T, A Brief History: The Bell System, <http://www.corp.att.com/history/history3.html> (last visited Apr. 19, 2010) [hereinafter *The Bell System*] (detailing the history of the AT&T corporation).

<sup>21</sup> The Bell System, *supra* note 20.

of rules that never stood up in Court<sup>22</sup> and was unhelpful in promoting a competitive industry.

So I would say I would agree with Professor Ammori and the others on the panel that the political objectives have to remain central. We have to make sure that people aren't cut off because of what they say, and that certain groups aren't favored because they're better connected in D.C. But we should be careful in creating rules for the FCC to administer because the network is very complex. People don't really understand how traffic flows. And it's not clear that any one simple rule would work.

**Professor Levi:** I agree with the centrality of the political objectives and the difficulty of regulating for them. The Internet is effectively an essential facility—even if not in specific antitrust terms, certainly in terms of its cultural usage and role. Access to broadband will be central to reducing the digital divide. So the question is how best to ensure that access. I don't think that one can be anti-regulation per se in this area because we can't completely avoid regulation. Sensible regulation, when well-administered, can be quite effective.

Let me make one point in response to Congressman Franks's reference to the break-up of AT&T. I'm not a telephone historian, but from what I understand, AT&T essentially made a deal with the government in which the government permitted AT&T to operate as a monopoly in exchange for AT&T's promise to provide universal telephone service even when it would be economically unprofitable to do so.<sup>23</sup> When AT&T was broken up, the government did not give up on the goal of universal service. It merely sought to achieve that goal by direct rather than implicit subsidies.

**Professor Ammori:** I just want to address two thoughts. In 1984, when the government broke up AT&T<sup>24</sup> and decided to move it into a more private industry model, the government still regulated the local phone company. They broke up the local phone companies into seven "Baby Bell" entities across the country so that there could be long distance companies that could compete.<sup>25</sup> And there were computer-type

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<sup>22</sup> See, e.g., Pub. L. No. 104-104, tit. V, § 505, 110 Stat. 56, 136, *invalidated by* United States v. Playboy Entm't Group, 529 U.S. 803, 806, 827 (2000).

<sup>23</sup> See Ted Sabety, *Nanotechnology Innovation and the Patent Thicket: Which IP Policies Promote Growth?*, 15 ALB. L.J. SCI. & TECH. 477, 490 (2005) (citing The Bell System, *supra* note 20).

<sup>24</sup> The Bell System, *supra* note 20.

<sup>25</sup> Bell.com, Regional Bell Operating Companies, <http://www.bell.com/rbocs.htm> (last visited Apr. 19, 2010); see also United States v. Am. Tel. & Tel., 552 F. Supp. 131, 141–42 & n.41 (D.D.C. 1982) (issuing a Modification of Final Judgment that details the

companies, and they'd compete. They would all have access to the local phone company—which was still highly regulated at almost the level of a regulated monopoly because the feeling was that you wouldn't get competition in the local market.<sup>26</sup>

And so the government policy was this: where we can have competition, we will take it, and where there is no competition, we will need some regulation to ensure that the computer services companies and the long distance service companies can all compete on equal footing.<sup>27</sup>

At the time we had to figure out a way to make sure that all Americans got access to the phone system, so we came up with this very complicated subsidy system.<sup>28</sup> And subsidizing services is kind of like regulation because the government comes in and interferes in the market by saying, "We don't think the market will produce certain outcomes; it won't lead to everyone in rural areas getting phone service." I think (as do many others) that we made a total mess of that situation,<sup>29</sup> but our hearts were in the right place.

Today we're hopefully going to transition over to subsidizing things like high speed Internet access. Right now, as we've been suggesting, the Internet is sort of a basic infrastructure for everything we do. People do their banking, get their health information, and look for jobs on the Internet. It's a basic infrastructure similar to electricity or even education. We want to make sure it is open and available to all people.

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circumstances surrounding the divestiture of the AT&T organization, including the fact that "AT&T . . . indicated in its reorganization plan [that] it will provide for the amalgamation of the twenty-two Operating Companies into seven regional Operating Companies").

<sup>26</sup> See James Gattuso, *Local Telephone Competition: Unbundling the FCC's Rules*, BACKGROUND (Heritage Found., Washington, D.C.), Feb. 10, 2003, <http://www.heritage.org/Research/Reports/2003/02/Local-Telephone-Competition>.

<sup>27</sup> See Barbara S. Esbin & Gary S. Lutzker, *Poles, Holes and Cable Open Access: Where the Global Information Superhighway Meets the Local Right-of-Way*, 10 COMM.LAW CONSP. 23, 31 (2001) (citing 47 U.S.C. § 230(b)(2) (2000)).

<sup>28</sup> See Michael R. Gardner, *December 19, 1984—A Big Day in Telecommunications*, 34 CATH. U. L. REV. 625, 630 (1985) (explaining how "the cost of local telephone service was being subsidized by long distance rates").

<sup>29</sup> See generally, e.g., *Universal Service: Reforming the High-Cost Fund: Hearing Before the Subcomm. on Communications, Technology and the Internet of the H. Comm. on Energy & Commerce*, 111th Cong. (2009) (testimony of S. Derek Turner, Research Director, Free Press), [http://energycommerce.house.gov/Press\\_111/20090312/testimony\\_turner.pdf](http://energycommerce.house.gov/Press_111/20090312/testimony_turner.pdf) (discussing the "convergence" of telephone infrastructure with broadband Internet infrastructure, and identifying an "opportunity to ensure universal affordable broadband access and [an] opportunity to significantly reduce the future burden on the Universal Service Fund"); Jonathan Weinberg, *The Internet and "Telecommunications Services," Universal Service Mechanisms, Access Charges, and Other Flotsam of the Regulatory System*, 16 YALE J. ON REG. 211 (1999) (discussing the need for a distinct regulatory scheme for IP transmission).



I'd like to talk for a moment about the potential for competition in the local network. In the local network usually you have just the one phone company to choose from for local phone service, and, for broadband service, you usually have the local phone company or the local cable company.<sup>30</sup> The TCA that Professor Candeub mentioned was an attempt to get some competition in the local market. The theory was that people couldn't build an entire local network from scratch to compete, but maybe they'd be able to lease access to parts of the incumbent's network, notably the last mile to a house. This way, many companies could compete, and the entrants wouldn't have to build a whole new network. We were unable to make that system work, but some countries have succeeded.<sup>31</sup> That is what happens when you have competition; it has to be regulated initially to make sure it can work.

**Professor Garry:** This is a good question to follow up on the previous question because so often this area presents contradictions. People who like to regulate in one area don't like to regulate in another. And I think you have to expose that. For instance, I am sometimes sympathetic to those who have inclinations to regulate content because certain content on the Internet is a threat to society and culture. But in that respect I do try to focus not on regulation but again on trying to give people a realistic choice.<sup>32</sup> Give people who want it the ability to get it, but give people who don't want it the ability to keep it out. Regarding access to Internet, I tend to be a bit skeptical of government intentions even though sometimes those intentions are genuinely good ones. I've never seen a regulatory scheme that's not well-intentioned.

So on one hand, we don't want to over-regulate the Internet, but then we do want to regulate access to certain content. I don't think that in those regulatory environments, government has done a very good job. I therefore remain skeptical.

**Professor Corcos:** Again, it would be wonderful to bring broadband access to places in this country that don't have it, but even in

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<sup>30</sup> See Kevin Werbach, *Connections: Beyond Universal Service in the Digital Age*, 7 J. ON TELECOMM. & HIGH TECH. L. 67, 69–70 (2009) (“In the U.S., over ninety percent of customers have no more than two broadband choices (DSL and cable modem).” (citing INDUS. ANALYSIS & TECH. DIV., FED. COMM'NS COMM'N, HIGH-SPEED SERVICES FOR INTERNET ACCESS: STATUS AS OF JUNE 30, 2007, at 3–4 (2008))).

<sup>31</sup> E.g., Blaine Harden, *Japan's Warp-Speed Ride to Internet Future*, WASH. POST, Aug. 29, 2007, at A1 (reporting that broadband service in Japan is “eight to [thirty] times” as fast as in the United States); Jennifer L. Schenker, *Vive la High-Speed Internet!*, BUS. WK., July 18, 2007, [http://www.businessweek.com/globalbiz/content/jul2007/gb20070718\\_387052.htm](http://www.businessweek.com/globalbiz/content/jul2007/gb20070718_387052.htm) (reporting that France is a “clear leader” in network service provision due to its “fierce” competition).

<sup>32</sup> See *supra* notes 13–16 and accompanying text.

places that do have it—for example, in my own city of Baton Rouge—we don't have a wide choice of providers. Broadband access is slow because the actual access coming into residences or even into the universities comes in via just one conduit. So the fact that you may have a choice of providers doesn't matter that much because you have only one way to bring it into the place that the provider serves (this is what the IT wizards have tried to explain to me, and, while I think I understand what they're saying, I'm not really a technical person).

Thus, I'm a bit concerned about how this will be done and the money that may be put into this initiative. I agree with Professor Ammori that there are, perhaps, problems with the technical portions of the TCA when you compare our problems with broadband access to the situation in Asian countries.<sup>33</sup> Access is also at least as fast and is cheaper in Europe.<sup>34</sup> Why is it that they've been so much more successful than we have? And why do we pay so much more for our access than they do?

**Congressman Franks:** I would now like to focus on two major dynamics: individuals' right to access the Internet and the regulation of access to certain content in this medium that so effectively integrates the pros and cons of other older forms of media (radio, television, etc.). This is Congress's biggest challenge: What is the access protocol, and what is the content we should or should not regulate? Competition is clearly important for access (twenty-four years ago, few people had cell phones; after de-regulation, millions now have cell phones and can even access the Library of Congress with those phones).

Let's now shift to content, as we've thoroughly probed the access question. In terms of indecency, is there *anything* that is so vile that it should be prohibited on the Internet? Who should decide that, and what should the criteria be for deciding what content can be restricted? Professor Corcos, we'll start with you.

**Professor Corcos:** Well, one criterion, for example, is the *Miller* test.<sup>35</sup> If something is obscene under the *Miller* test, it could be

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<sup>33</sup> See Werbauch, *supra* note 30, at 69 (citing DANIEL K. CORREA, INFO. TECH. & INNOVATION FOUND., ASSESSING BROADBAND IN AMERICA: OECD AND ITIF BROADBAND RANKINGS (2007), available at <http://www.itif.org/files/BroadbandRankings.pdf>).

<sup>34</sup> *Id.* (citing Org. for Economic Co-Operation & Dev., OECD Broadband Portal, [http://www.oecd.org/document/54/0,3343,en\\_2649\\_34225\\_38690102\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/54/0,3343,en_2649_34225_38690102_1_1_1_1,00.html) (last visited Apr. 19, 2010)).

<sup>35</sup> *Miller v. California*, 413 U.S. 15, 24 (1973). The Court articulated the test as follows:

The basic guidelines for the trier of fact must be: (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts

prohibited on the Internet.<sup>36</sup> That's one way to regulate obscenity.

Defamation can also be prohibited (I'm not talking about Internet service providers who can ask for protection under section 230 of the Communications Decency Act,<sup>37</sup> but somebody who does not get the protection of section 230). I'm also assuming that you're not talking about prior restraint here. You're talking about speech that is disseminated and then someone brings either a criminal or civil suit because of that speech. If that is the case then yes, I think there is speech that can be prohibited.

**Congressman Franks:** And what would be the criteria for determining that?

**Professor Corcos:** Well, if it's obscenity, for example, the *Miller* test criteria would apply. But, as you know, those kinds of prosecutions are hard to win.

**Congressman Franks:** They are?

**Professor Corcos:** Yes, they are.

**Professor Garry:** Well to some degree, there is an idealistic answer to this question. Are there things we should prohibit? Yes. Should we prohibit obscenity? Yes. Could we prohibit more? I'm answering the question, so I'd say yes. I think that there is some pretty harmful material out there, and I think it is not the kind of material the Framers necessarily intended the First Amendment to protect.

I advocate a political speech model for the First Amendment—anybody who says anything with respect to any political issue in any respect has complete and absolute freedom to do so. But when you're talking about some of the images out there; well, I wouldn't even define those as speech. I see them more as products sold by commercial enterprises, and they are products that cause real harm. On the one hand, we regulate cigarettes because of their harm to individuals. But on the other hand, we're so hesitant to regulate (or at least take a stand against) content that causes real harm.

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or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

*Id.* (internal citations and quotation marks omitted).

<sup>36</sup> *Id.*; see also *United States v. Thomas*, 74 F.3d 701, 706–09 (6th Cir. 1996) (distinguishing intangible, pre-recorded sexually-explicit messages from obscene computer-generated images, thus subjecting such images to 18 U.S.C. § 1465).

<sup>37</sup> Communications Decency Act of 1996 § 509, 47 U.S.C. § 230 (2006).

It's hard for me to come up with my own proposal because, after all, that is what the First Amendment tries to avoid. I can't come up with the rules; none of us individually can come up with the rules. But we must have some kind of rule on this. The courts have already told us that obscenity is something that we can prohibit.<sup>38</sup> But it takes a lot to be able to qualify for obscenity, as Professor Corcos said. I guess I try to get away from this a little bit. I already feel that we ought to prohibit certain content because I think some of it is truly vile with absolutely no redeeming social quality, but I'm probably different than other people in terms of applying the *Miller* test.<sup>39</sup> I would probably apply it more broadly than it has been applied by the courts. I don't think there is any redeeming social value to some content, and I think the only reason we do not prohibit it is because we are simply afraid of taking a stand on where to draw the line.

The good thing about distinguishing political speech from non-political speech is that you never draw an absolute line. As long as you can debate whether you ought to regulate a certain kind of speech, the door is always still open. Maybe I don't think that certain programming depicting certain images that are offensive to me ought to be shown, but as long as I can debate it then that issue is still open. And that still leaves the issue with the people—with the public—so I guess the answer that I'd give is yes—I think we can prohibit certain content. I think it is a matter for the community to decide, and in many respects the community does have that power as long as we absolutely protect political speech because the debate will never be frozen. We will always be able to debate, in fact, whether the speech is of a harmful type. Thank you.

**Professor Ammori:** This is an area slightly outside of my expertise, but when I think of things that we could block online, child pornography comes to mind. Oddly enough, you cannot—according to the Supreme Court—block *simulated* child pornography; that is, something like computer-generated child pornography.<sup>40</sup> But “regular” child pornography is something we can prohibit. So some sites that contain child pornography and sites that are devoted to pedophiles coming together, collaborating, and generally conspiring to do “weird” things with real children—those *can* be blocked, I believe.

Now the methods for doing so—from what I understand—are fairly

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<sup>38</sup> See *Miller*, 413 U.S. at 24 (holding that an obscene offense that can be regulated is one “which, taken as a whole, appeal[s] to the prurient interest in sex, which portray[s] sexual conduct in a patently offensive way, and which, taken as a whole, do[es] not have serious literary, artistic, political, or scientific value”).

<sup>39</sup> See *supra* note 35 and accompanying text.

<sup>40</sup> *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253–55 (2002).

targeted and essentially involve criminal investigations. If you were investigating, you would do a criminal investigation. You would block specific IP addresses. There is often collaboration with a non-profit independent group called “NCMEC”—the National Center for Missing and Exploited Children.<sup>41</sup> That is a great group that has a lot of law enforcement experts on the board.<sup>42</sup> Some people look at that model and take comfort in knowing that it is not just the government or just the carriers involved in this investigation; there is this sort of “outside” organization that specializes in policing this issue. And as long as you have checks and balances in different sorts of groups that people trust, and if you have open protocols that people understand along with very specific, targeted blocking, then the threat to legitimate speech is fairly low while the benefit of going after this kind of real, vile, dangerous speech is pretty high. So that’s one example.

Spam: spam can be regulated to some extent. We have done a bad job of it with the CAN-SPAM Act.<sup>43</sup> The whole idea was to “can spam”—like throwing it into the trash “can.” I have a friend who works in Internet advertising, and he refers to it as the “I CAN SPAM Act” because it essentially authorized spam in some ways.<sup>44</sup> But under the commercial speech doctrine, which is a doctrine that gives a little less protection to commercial speech than to other speech, things like spam or unwanted telemarketing phone calls can be regulated in certain ways.<sup>45</sup>

And another thing that can be regulated and blocked within the network—one of the very few things that I think can be blocked within the network—without needing the government to conduct an investigation or needing NCMEC to get involved, is a type of “speech” (if we can call it that) of “worms” or “network attacks.”<sup>46</sup> Almost everything on the Internet is some kind of speech, but network attacks are a certain type of content that is obviously worthy of discrimination.

Professor Candeub said earlier that there are some non-neutral

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<sup>41</sup> Nat’l Ctr. for Missing & Exploited Children, [http://www.missingkids.com/missingkids/servlet/PublicHomeServlet?LanguageCountry=en\\_US](http://www.missingkids.com/missingkids/servlet/PublicHomeServlet?LanguageCountry=en_US) (last visited Apr. 19, 2010).

<sup>42</sup> Nat’l Ctr. for Missing & Exploited Children, Federal Law-Enforcement Agencies, [http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en\\_US&PageId=2285](http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=2285) (last visited Apr. 19, 2010).

<sup>43</sup> Pub. L. 108-187, 117 Stat. 2699 (2003) (codified at 15 U.S.C. §§ 7701–13, 18 U.S.C. § 1037, and 47 U.S.C. § 227 (2006)).

<sup>44</sup> See 15 U.S.C. § 7704 (2006) (delineating consumer email protections that, on their face, do not categorically outlaw spam).

<sup>45</sup> Robert Sprague, *Business Blogs and Commercial Speech: A New Analytical Framework for the 21st Century*, 44 AM. BUS. L.J. 127, 138–48 (2007) (discussing the evolution of the commercial speech doctrine).

<sup>46</sup> See 15 U.S.C. § 7703(c) (2006).

things on the Internet. Net neutrality is actually fairly particular; all of you can do things like buy faster servers or faster computers, or pay for caching or better peering arrangements.<sup>47</sup> All of those are available in competitive markets. But the “last mile” access isn’t competitive,<sup>48</sup> which is where we would want to have a sort of non-discrimination rule, with the exception of network attacks.

**Professor Levi:** Congressman Franks has asked whether there is anything so vile that it should be prohibited and who should decide. There is a lot of vile speech out there. One recent example is the dog-fight video case in which oral argument was heard by the Supreme Court last week, I believe.<sup>49</sup> To summarize, although dog-fighting is apparently illegal in most states,<sup>50</sup> a purveyor of dog-fighting videos supposedly produced in places where dog-fighting is legal, claims protection under the First Amendment.<sup>51</sup> These videos, like the related “crush videos” in which women in high heels are depicted stepping on and killing small animals,<sup>52</sup> are apparently designed to appeal to those with sexual fetishes involving cruelty to animals.<sup>53</sup> Congress has recently attempted to pass legislation designed to stop crush videos,<sup>54</sup> but the language of the legislation is quite broad.<sup>55</sup> The oral argument suggests skepticism on the part of the justices that this particular legislation could pass constitutional muster.<sup>56</sup> Ironically, during the latter part of the twentieth century, the contours of the First Amendment have been defined not as

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<sup>47</sup> *E.g.*, Press Release, Fed. Comm’ns Comm’n, New Principles Preserve and Promote the Open and Interconnected Nature of Public Internet (Aug. 5, 2005), *available at* [http://fjallfoss.fcc.gov/edocs\\_public/attachmatch/DOC-260435A1.pdf](http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-260435A1.pdf) (referencing the ability of consumers to choose Internet content and providers).

<sup>48</sup> *See* Posting of Ed Felten to Freedom to Tinker: The Last Mile Bottleneck and Net Neutrality, <http://www.freedom-to-tinker.com/blog/felten/last-mile-bottleneck-and-net-neutrality> (June 14, 2006, 01:25 EST). “Last mile” access is defined as “the access link that connects the information-rich Internet (and the World Wide Web) to the end user.” John Apostolopoulos & Nikil Jayant, *Broadband in the Last Mile: Current and Future Applications*, in *BROADBAND LAST MILE: ACCESS TECHNOLOGIES FOR MULTIMEDIA COMMUNICATIONS* 1, 1 (Nikil Jayant ed., 2005).

<sup>49</sup> Transcript of Oral Argument, *United States v. Stevens*, No. 08-769 (U.S. argued Oct. 6, 2009), *available at* [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/08-769.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/08-769.pdf).

<sup>50</sup> *See* HUMANE SOC., FACT SHEET—DOGFIGHTING: STATE LAWS (2009), *available at* [http://www.humanesociety.org/assets/pdfs/animal\\_fighting/dogfighting\\_statelaws.pdf](http://www.humanesociety.org/assets/pdfs/animal_fighting/dogfighting_statelaws.pdf).

<sup>51</sup> Transcript of Oral Argument, *supra* note 49, at 25.

<sup>52</sup> *Id.* at 27–28.

<sup>53</sup> *Id.* at 28.

<sup>54</sup> *See* 18 U.S.C. § 48 (2006).

<sup>55</sup> *United States v. Stevens*, 533 F.3d 218, 220 (3d Cir. 2008), *cert. granted*, *United States v. Stevens*, 129 S. Ct. 1984 (2009).

<sup>56</sup> *See* Transcript of Oral Argument, *supra* note 49, at 3–27, 29.

much by politics as by smut. This is yet another example.

Many will doubtless be shocked by the result if the Court strikes down Congress's attempt to create some boundaries to offensive speech in this case. Some will argue that government should not censor even very vile speech. But we don't have to go that far to argue that Congress should be very careful and precise in its attempts to regulate in this area. Even if the desire to regulate the vilest speech is understandable, it must be done within constitutional bounds.

In addition, even those who think that the vilest, most harmful expressive content should be regulable don't necessarily agree that speech short of that extreme should be censored. So, whatever regulatory discretion exists with respect to the vilest speech, we still need to answer the question of where the boundaries lie short of that. Focusing on the vilest speech doesn't address that.

**Professor Candeub:** I want to reiterate a lot of what Professor Corcos and Professor Levi said. I often have attempted to have a student write a law review note for me distinguishing between obscenity and indecency. For those of you who are not familiar with the statute and the relevant constitutional distinctions, indecency can be regulated by the FCC as lesser protected speech.<sup>57</sup> Obscenity is not protected speech, and it can be prohibited completely.<sup>58</sup>

It's actually very difficult and a rather unpleasant procedure to try to identify what constitutes obscenity as opposed to indecency because you have to look at and analyze, in legalistic terms, very specific and explicit sexual acts.<sup>59</sup> I've never been able to get a student to actually write that, and, I understand my students' disinclination, as I certainly would not enjoy writing such an article. But let me pick up on what Professor Levi said and ask whether this question about line-drawing on the extremes is really distracting us from what is bothering a lot of us about the media. And it can be much broader than is in fact demonstrated in the law.

Professor Corcos's discussion of the television show *Two and a Half Men* and the scene of the boy confronting his uncle (who was very hung-over)<sup>60</sup> resonated with me because that seems exactly the same scene done fifty years ago in an old movie called *Auntie Mame* with Rosalind Russell.<sup>61</sup> This was a great old movie based on a book by Patrick Dennis,

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<sup>57</sup> See CONSUMER & GOV'T AFFAIRS BUREAU, FED. COMM'NS COMM'N, FCC CONSUMER FACTS: OBSCENE, INDECENT, AND PROFANE BROADCASTS 1 (2008), <http://www.fcc.gov/cgb/consumerfacts/obscene.pdf>.

<sup>58</sup> *Id.*; *Miller v. California*, 413 U.S. 15, 24, 36–37 (1973).

<sup>59</sup> *Miller*, 413 U.S. at 24, 36–37.

<sup>60</sup> *Two and a Half Men: Pilot* (CBS television broadcast Sept. 22, 2003).

<sup>61</sup> *AUNTIE MAME* (Warner Brothers Pictures 1958).

which I think is a great novel.<sup>62</sup> This movie depicted the same scene—the nephew confronting his hung-over aunt in the morning after a night of drinking. This scene presented some important moral issues, such as showing the person who should be the role model in less-than-ideal shape. What was amazing about it in *Auntie Mame* is how witty and how clever it was—how in the end Auntie Mame got over her splitting headache and assumed her proper role, taking an interest in her nephew. And I thought how much funnier that older movie’s scene was without the use of the word “ass.”

It struck me how coarsened our society has become. I think that is a fact; I do not think one has to be a crazy cultural conservative to believe that. My question is: What do we do about it? Do we look to the arcana of communications law, which really can only work around the fringe, and only imperfectly? Or, I think, do we look to ourselves and our freedoms to sort of create more vital cultures that can compete against a society which, in general, is not the society that it was fifty years ago? The solution to that might be more social than legal.

**Congressman Franks:** All right, this will conclude the main portion of our panel discussion. I thank all of our distinguished panelists for their input. We will now allow the audience to ask questions.

**Audience Question 1:** Hello. I have a couple of questions as a private citizen, so to speak, which I feel reflect the feelings of many people. First, what are the chances that these issues could be really handled constitutionally at the state or local level, where the people themselves could take responsibility and have a direct voice, rather than leaving it in the hands of the remote and centralized federal government and the executive-based regulatory agencies, which themselves are constitutionally questionable? An example of this, to explain my meaning, is that from the perspective of many people—mine included—it appears that the federal government has actually interfered with efforts to stop Internet pornography.

My second question goes along with the first: Is not the very existence of the seemingly unconstitutional executive-based regulatory agencies itself a threat to our limited government and therefore our freedoms? My questions are addressed to Professor Garry and Congressman Franks. Thank you.

**Professor Garry:** I was afraid I was going to get that question. I mean, that is a good question; it is just a very broad question. I actually wrote a good share of a book on the notion of rights and federalism which

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<sup>62</sup> PATRICK DENNIS, *AUNTIE MAME: AN IRREVERENT ESCAPE* (1955).



asked the following question: Under our current individual rights jurisprudence as articulated by the Supreme Court, has there emerged a more centralized notion of rights and liberties than we might otherwise need?<sup>63</sup> I do not know how to condense an answer in the time we have, but I think that is a very good question to ask: Has our notion of rights perhaps become too centralized along the way? Do we now not allow then for state and local governments to have a bit more freedom in terms of defining how they want to protect rights, or what they want to do about particular rights?

So I do sympathize with that—and this gets way off the point—but when you talk about the notion of limited government, of course I think one of the things that we have really forgotten in terms of constitutional law and constitutional history is that originally under the Constitution, liberty was protected in a very structured manner through the concepts of limited government, separation of powers, and federalism. And that was how liberty was primarily protected according to the Framers; it was not through a listing of individual rights like we have in the Bill of Rights. It was to be structural; it was to create a kind of a government that would not be able to infringe upon liberties, and that way we could protect liberty in a much more overarching manner than to simply specify a certain number of liberties and then leave it up to the Court to define what those liberties are.<sup>64</sup>

Of course, that changed much during the New Deal period when the Court gave up enforcing those structural provisions—the separation of powers and federalism—and I think we lost that protection of liberty.<sup>65</sup> It is no surprise then that you can trace the way the Court subsequently became very much more active in terms of individual rights during the Warren court era because—in effect—it had to. That was the only way we were going to protect liberty—through individual rights—because we had lost that whole structural basis built into the Constitution that was the original mechanism for protecting our liberties. So the Court almost had to focus on that, and we have not seen the Court—even under Rehnquist and Roberts—diminish in any way at all the notion of these newly-centralized individual rights because they cannot do so if we do not have any other protections in the Constitution.<sup>66</sup> So with that probably non-responsive answer, I will push it back to Congressman Franks.

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<sup>63</sup> PATRICK M. GARRY, *AN ENTRENCHED LEGACY: HOW THE NEW DEAL CONSTITUTIONAL REVOLUTION CONTINUES TO SHAPE THE ROLE OF THE SUPREME COURT* 1–9 (2008).

<sup>64</sup> *Id.* at 3–4.

<sup>65</sup> *Id.* at 2–4.

<sup>66</sup> *See id.* at 4–9.

**Congressman Franks:** I think it was very responsive. I absolutely agree with the gentleman's fundamental premise. In fact, that was one of the points I was trying to drag out of the panel in regards to how to regulate and who can regulate (and with what criteria those people can regulate) obscenity.

But I think it really does come down to a community standard of some kind; even former Supreme Court Justice Stewart once noted that although he could not define obscenity, he would know it when he saw it.<sup>67</sup> It really does come down to a judgment call, and it speaks to whether we are a society that has become so coarse that nothing does offend us—or that nothing offends us to such a degree that we are willing to say that we are going to make a policy choice to prohibit something categorically. I think that if we did assess the community standard, that would be a much more effective way of defining obscenity.

Yet there is another aspect to this challenge. For one thing, prohibiting certain content would really mess up those who make money on pornography or obscenity, so they go to the courts, and unfortunately many times they find a willing ear.<sup>68</sup> So it is really not Congress that has exacerbated the problem in trying to regulate it. It is, rather, the courts that have made it almost impossible for Congress to postulate any kind of mechanism that they will accept.<sup>69</sup>

This is a tough situation. At the end of the day, if somebody falsely yelled “fire” in this room, and somebody got trampled upon on the way out, he or she would have a cause of action against the person who yelled “fire.”<sup>70</sup> There are some types of speech that do harm to other people, and from my perspective, we need to ask this: When people talk about victimless crimes, are those crimes indeed victimless? If it is victimless, then there is no crime, but many times the victim is hidden. I think in the area of obscenity that is a perfect example. I hope that helps a little bit.

**Professor Levi:** Could we weigh in as well please?

**Congressman Franks:** Sure.

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<sup>67</sup> *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (“I shall not today attempt further to define the kinds of material I understand to be embraced within [hard-core pornography] . . . . But I know it when I see it . . . .”).

<sup>68</sup> *See supra* note 1 and accompanying text.

<sup>69</sup> *See id.*

<sup>70</sup> *Schenk v. United States*, 249 U.S. 47, 52 (1919) (recognizing that “[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic”).

**Professor Candeub:** I would say one solution is to go after the advertisers to the degree that the show is on broadcast or cable television. I recall a remarkable anecdote about a woman who hated the television show *Married with Children*. She had this huge campaign against that show and targeted neither the television producers nor the television networks, but the advertisers.<sup>71</sup> She was remarkably successful in getting certain changes in the script, thus making the script less offensive to her.<sup>72</sup> I think that is a mechanism that is really under-used. Broadcasters are not necessarily agents of cultural degeneracy; they are profit-maximizers. They get their money from advertising, and advertisers want to make their consumer base happy. That can work both on the national level and the local level because about one-fourth to one-half of all advertising on broadcasts is locally based.<sup>73</sup>

**Professor Levi:** I want to resist the suggestion in the question that the courts are the problem. First, without suggesting that members of Congress need not take the Constitution into account, it is the courts' duty to make their own interpretations of the Constitution. In case of conflict, our constitutional order requires that the courts' interpretations prevail.<sup>74</sup> So judicial interpretations of the First Amendment in the area of offensive expression cannot simply be written off as misinterpretations. Congress has to legislate as best as it can within constitutional norms, but it is finally the courts' obligation to determine if it has done so.

Second, I am troubled as much by the tone and tenor of political discussion these days as by indecency on television. Professor Garry is saying that political discussion, on both the right and left, can be permitted to be as nasty or as snarky as desired, without threat of regulation. But because of a reading of politics that limits the definition

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<sup>71</sup> Bill Carter, *TV Sponsors Heed Viewers Who Find Shows Too Racy*, N.Y. TIMES, Apr. 23, 1989, at 1.

<sup>72</sup> *A Mother Is Heard as Sponsors Abandon a TV Hit*, N.Y. TIMES, Mar. 2, 1989, at A1.

<sup>73</sup> See JACK W. PLUNKETT, PLUNKETT RESEARCH, LTD., PLUNKETT'S ADVERTISING & BRANDING INDUSTRY ALMANAC 32–33 (2009).

<sup>74</sup> See *City of Boerne v. Flores*, 521 U.S. 507, 519, 536 (1997) (holding that RFRA, the Religious Freedom Restoration Act of 1993, exceeded Congress's powers under § 5 of the Fourteenth Amendment and stating that Congress's power "extends only to 'enforc[ing]' the provisions of the Fourteenth Amendment," not to determining "what constitutes a constitutional violation," and that "the courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution" (alterations in original)); see also *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (holding that "Congress is the final authority as to desirable public policy," but cannot "rewrite the Fourteenth Amendment law laid down by th[e] Court").

of “politics” to electoral politics, the protected zone for expressive debate is defined rather narrowly. On this approach, the values of the most repressive people in the most repressive communities can serve as regulatory baselines so long as the speech at issue is not political. This means that government can regulate sexual expression that some deem offensive even without having to show harm, while being prevented from legislating the kind of reasonable, restrained speech that many would far prefer over the extreme rhetoric that marks modern political discourse.

Lastly, let me comment to the original question about regulation on the local level. Ordinarily, I might agree that differences in local mores could justify a diversity of indecency regimes. The problem is that because of the economic incentives of content providers as well as the global access to and marketing of expressive content, the preferences of the most puritanical localities may well determine what is available to everyone else around the world.<sup>75</sup>

**Congressman Franks:** Let me briefly respond. As a member of the Constitution Committee, I believe in Congress working within the confines of the Constitution. The challenge is that every time the Supreme Court sits down, they have a different view of the Constitution. But I do not think the founding fathers had in mind child pornography when they wrote the First Amendment. It is a great challenge for those of us in Congress; I swore to uphold the Constitution, but I did not swear to do what the Supreme Court told me to do. I have to try to do the best I can within those confines. And now, we have time for one more question.

**Audience Question 2:** I have a slightly more specific question, but it relates to what Professor Levi was speaking about a moment ago. I have been reading about a proposal to reserve a “.xxx” domain,<sup>76</sup> or extension of the bandwidth exclusively for pornography, and I wonder if the panelists, and especially Professor Ammori, have any opinions on whether this would actually serve to quarantine the objectionable content, or is it more likely to serve as a launching pad for more robust invasions of the other domains?

**Professor Ammori:** There was a controversy and debate at the

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<sup>75</sup> See *Reno v. ACLU*, 521 U.S. 844, 877–78 (1997) (“The ‘community standards’ criterion as applied to the Internet means that any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended by the message.”).

<sup>76</sup> Ryan Paul, *Proposal to Erect XXX Domain Faces Stiff Opposition*, ARSTECHNICA.COM, Mar. 28, 2007, <http://arstechnica.com/tech-policy/news/2007/03/proposal-to-erect-xxx-domain-faces-stiff-opposition.ars>.

international level over .com, .net, .xxx, and whether you could put all pornography on .xxx.<sup>77</sup> The proposal's premise was that it would be good for the pornography industry because everyone would know where to find it—anyone who wanted to find it. And it would be good for children because parents could use tools to block the whole .xxx domain.

It didn't happen, largely because the U.S. government opposed the proposal. Some groups in the United States believed the .xxx domain would legitimize pornography.<sup>78</sup> At any rate, my guess is that you cannot put everything dangerous on .xxx. For instance, people will buy URLs with innocuous names but use them as porn sites, and try to fool those surfing the net into going to those sites.<sup>79</sup> You also know that there is dangerous material that children can access all over the Internet—not just on pornographic sites. Consider chat rooms, Facebook, MySpace—those are not going to be on .xxx, and you have to make sure there are some precautions to deal with the kind of content that kids would encounter there as well.

**Congressman Franks:** As a member of Congress, it has been my privilege to be here, and I thank all of you for your thoughts. Obscenity issues are particularly difficult to discuss, but sooner or later our society must address them because of the profound impact upon future generations. There comes a time in every child's life when the door to childhood quietly closes forever, and after that no mortal power on earth can open it again. So we members of Congress do not have the luxury of ignoring these issues. We must deal with them directly, remembering who we are, and remembering that we protect political free speech while simultaneously protecting children from exploitative and opportunistic behavior.

I also thank Regent University and everyone involved with this Symposium. It has been my honor to be here. Let us charge the gates, for time is running out. Thank you.

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<sup>77</sup> See John Fee, *The Pornographic Secondary Effects Doctrine*, 60 ALA. L. REV. 291, 334–37 (2009); Cheryl B. Preston, *All Knowledge is Not Equal: Facilitating Children's Access to Knowledge by Making the Internet Safer*, 13 INT'L J. COMM. L. & POLY 114, 114–24 (2009).

<sup>78</sup> E.g., Patrick Trueman, Op-Ed., *.xxx Would Legitimize Porn*, USA TODAY, Sept. 15, 2005, at 12A.

<sup>79</sup> For example, Whitehouse.com is a well-known porn site, while Whitehouse.gov is the official White House site.