

# **Paradox and Structure: Relying on Government Regulation to Preserve the Internet's Unregulated Character**

Thomas B. Nachbar

## **Abstract**

The Internet's power as a communications medium has been the focus of a great deal of attention, but the Internet still lacks uniform and readily understood rules for much of what goes on there. Recently, there has been a flurry of activity to create such rules, with particular emphasis on private regulation of activity on the Internet.

In this article, I examine one area of Internet regulation, the regulation of mature content. After evaluating different methods for Internet content regulation, I conclude that the most efficient form of Internet content regulation is ratings-based filtering, with Internet content providers having the responsibility for applying ratings to their content. In order to preserve the Internet's value as a place of free development of both ideas themselves and ideas about how to share ideas, any such regime must be voluntary.

Because market forces are an inadequate brake on overreaching by private Internet content regulators -- and because private entities are poorly situated to provide Internet content regulation -- the federal government is the best potential source of Internet content regulation. The key to efficient and effective government regulation of mature content on the Internet is the use of power-conferring, instead of proscriptive, rules. Reliance on federal Internet content regulation as implemented through power-conferring rules may have the practical effect of spreading free speech protections across international borders. Finally, I address the constitutionality of federal Internet content regulation and conclude that any system of federal Internet content regulation must be voluntary.

Keywords: Internet, First Amendment

Jel: O33, O38, Z10

This paper can be downloaded from the  
Social Science Research Network Electronic Paper Collection:  
[http://papers.ssrn.com/paper.taf?abstract\\_id=259951](http://papers.ssrn.com/paper.taf?abstract_id=259951)

## Paradox and Structure: Relying on Government Regulation to Preserve the Internet's Unregulated Character

Thomas B. Nachbar<sup>†</sup>

The Internet's power as a communications medium has been the focus of a great deal of attention. The Internet allows people to communicate quickly, across the globe, and at extremely low cost. But there is something more fundamental about the Internet that separates it from other communications media. An integral part of the Internet's structure is its ability to support within it the creation of *other* structures. Exhibiting a degree of flexibility that no other form of communication can match, the Internet not only allows its users to communicate, it gives them the power to define the structure of that communication—to not only carry on a dialog but to redefine what a “dialog” is.<sup>1</sup> Thus the Internet, a network with very little structure of its own, is home to some of the most highly structured communications on the planet, in which participants are provided lists of pre-defined options and, often without their knowledge, re-directed to other locations and tracked using information written to and read from their own hard drives.

One of the reasons why the Internet is so powerful is because it is a place with relatively few rules. To the extent we think that the Internet's power is a good thing, we should probably resist the urge to impose new rules on it. Or should we? Because we don't yet know what the Internet's full

---

<sup>†</sup> Associate, Mayer, Brown & Platt; Senior Editor, *The Green Bag*. Many thanks to Ross Davies, Frank Easterbrook, Mike Gerhardt, Mark Lemley, Lawrence Lessig, Keith Sharfman, and Tim Wu for extremely helpful comments.

1. This characteristic of the Internet is known as “end-to-end” networking, a networking model in which the network is seen as providing communications services, but in which the applications at either end of the network are solely responsible for processing the data carried on the network. See generally J.H. Saltzer et al., *End-to-End Arguments in System Design*, 2 ACM TRANSACTIONS IN COMPUTER SYSTEMS 277 (1984).

potential is, and because the Internet is too young to have reached any kind of regulatory equilibrium,<sup>2</sup> it could very well be that the *lack* of uniform and readily understood rules is keeping the Internet from reaching its true potential.

Despite its Wild-West image, the Internet is no stranger to rules; as much as the Internet benefits from a lack of rules, it is itself a set of rules, the slightest deviation from which results in complete isolation from the rest of the network.<sup>3</sup> Communications broadcast on the Internet in a form that does not comply with the Internet's rules, or protocols, will not be recognized by the other computers on the Internet and will thus disappear into the network never to be heard by another. Similarly, a computer that does not follow those same protocols will receive no information from the Internet despite the fact that there will be information flowing through the wires to which that computer is connected.

The Internet's propensity for paradox, as demonstrated by its oft-ignored devotion to rules, calls for a considered approach to questions surrounding its regulation. First impulses about the Internet often turn out to be wrong because the Internet is so profoundly different from previous objects of regulation. And so it seems with the first impulse of many who have called for government to take a hands-off approach to the Internet,<sup>4</sup> particularly in the area of speech regulation on the Internet.<sup>5</sup>

These impulses, I argue, are born of an incomplete view of what it means for the government to "regulate" an activity. Not all regulation consists of rules proscribing conduct; "to

---

2. See generally JOHN NAUGHTON, A BRIEF HISTORY OF THE FUTURE: FROM RADIO DAYS TO INTERNET YEARS IN A LIFETIME 231-52 (1999) [hereinafter NAUGHTON, A BRIEF HISTORY OF THE FUTURE] (summarizing the rapid growth, changing character, and changing demographics of Internet users since the advent of the World Wide Web in the early 1990s).

3. See *id.* at 167 (describing the incompatibility between an old protocol used on the Internet, the Network Control Program or "NCP," and the currently used protocol, Transmission Control Protocol/Internet Protocol, the now-familiar "TCP/IP").

4. See, e.g., John Perry Barlow, *A Cyberspace Independence Declaration*, at [http://www.eff.org/pub/Publications/John\\_Perry\\_Barlow/barlow\\_0296.declaration](http://www.eff.org/pub/Publications/John_Perry_Barlow/barlow_0296.declaration) (Feb. 9, 1996) ("Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather.").

5. See generally MIKE GODWIN, CYBER RIGHTS: DEFENDING FREE SPEECH IN THE DIGITAL AGE (1998) (recounting efforts by the author and others to prevent government from regulating speech on the Internet).

regulate” does not necessarily mean “to restrict.” Government often regulates through rules that structure, instead of ban, certain activities. Far from reducing individuals’ power by imposing duties or outlawing certain conduct, rules of this kind increase autonomy by allowing individuals to assume duties that they would otherwise be powerless to undertake. This feature of law-as-organizer (instead of law-as-proscriber) is nothing new. The law of contracts, for instance, is made up almost exclusively of such rules, rules that H.L.A. Hart called “power-conferring” rules.<sup>6</sup> The half-sided perception of law solely as regulation by restriction—a perception shared by government regulators and free-speech advocates alike—has blinded us to the possibility of relying on power-conferring laws as the source of Internet content regulation. Faced with government content regulation based on the proscriptive model of law,<sup>7</sup> we may be driven toward private regulation of Internet content. But private Internet content regulation may not be the salvation from onerous regulation that its proponents—both those who oppose government regulation and those who have authored private regulation—perceive it to be. Instead, unfettered by traditional safeguards against improper speech regulation, private Internet content regulation may result in the suppression of considerably more speech on the Internet than any regulation the government could impose. Internet content regulation can, and in the end must, be found in power-conferring rules as implemented by government in the form of law.

This Article addresses the issue of how best to approach Internet content regulation. The method we adopt for regulating Internet content—and specifically for regulating access to a sub-set of that content, what I call “mature” content<sup>8</sup>—will have implications not only for the content to be

---

6. H.L.A. HART, *THE CONCEPT OF LAW* 33 (2d ed. 1994).

7. See, e.g., Child Online Protection Act, Pub. L. No. 105-277, 112 Stat. 2681-736 (1998) (codified at 47 U.S.C. §§ 223, 230-231); Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133 (codified in scattered sections of 47 U.S.C.).

8. For the purposes of this Article, I will use the term “mature” to describe material that content consumers may want to avoid, either for their children’s sake or for their own. The term is intentionally vague. What is too mature for a child of five may not be too mature for a child of twelve, and content that is considered “mature” by the parents of one 5-year-old may not be considered so by the parents of another. Discussion about what content is unsuitable for children (or sensitive adults) or about the ability of schools and libraries to independently control what Internet content is viewed by their

found on the Internet, but also for the structure of the Internet itself. The Internet's role in the expression of ideas is expanding quickly and at the cost of other forms of communication.<sup>9</sup> At the same time, it is clear that society is demanding some method for shielding itself, or at the very least for shielding children,<sup>10</sup> from mature content. The Internet's increasing importance highlights the need for the utmost caution in considering how we regulate it, while the same trend toward broader use of the Internet feeds demand for more control over how children access it. The Internet's increasing centrality as a source of information, and the increasing amount of information on the Internet, makes us even more dependent on rules that affect its structure. As demonstrated by another paradox of the Internet, in a world in which content is likely to be inexpensive and abundant, the structure we use for arranging that content may have a greater impact on society than the underlying content itself, because it will become increasingly necessary to rely on structure imposed on the Internet to sort through the increasing mass of information available on the Internet to find what we want.<sup>11</sup> We should be particularly careful in picking an Internet content-regulation

---

students and patrons is beyond the scope of this Article.

9. See Thomas Hargrove & Guido H. Stempel III, *Internet Users Read More, Depend upon TV Less*, PITTSBURGH POST-GAZETTE, Aug. 14, 1999, at A4 (according to a survey conducted by the Scripps Howard News Service and Ohio University, the number of people in the United States regularly using the Internet almost quintupled at the same time that the viewership of national television news fell almost twelve percent); The Pew Center for the People and the Press, *Investors Now Go Online for Quotes, Advice: Internet Sapping Broadcast News Audience*, <http://www.peoplepress.org/media00sec2.htm> (last visited Aug. 28, 2000) (reporting that from 1998 to 2000 the number of Americans watching nightly broadcast news fell twenty-one percent while the number of Americans going online for news increased seventy-seven percent).

10. There is also reason to consider the desire of some adults to avoid experiencing certain content on the Internet. Cf. *Rowan v. United States Post Office Dept.*, 397 U.S. 728, 738 (1970) (discussing the power to exclude unwanted mail from one's home). Because any system that would screen children from mature content could also be used by adults to screen themselves from the same content, I will focus on content-regulation regimes that limit children's ability to access Internet content.

11. J.M. Balkin, Comment, *Media Filters, the V-Chip, and the Foundations of Broadcast Regulation*, 45 DUKE L.J. 1131, 1133 (1996); see also Andrew Shapiro, *The Danger of Private Cybercops*, N.Y. TIMES, Dec. 4, 1997, at A31 ("When total filtering meets information overload, individuals can (and will) screen out undesired interactions, including those crucial to a vibrant political culture . . .") [hereinafter Shapiro, *The Danger of Private Cybercops*].

regime because the choice of a regime will have a profound effect on the Internet's structure. Only by considering the structure of the Internet, and specifically the paradoxes created by that structure, can we devise a form of regulation that is optimal in both the economic and qualitative senses.

I argue in this Article that the optimal solution is for the United States government to establish a ratings system to be used by Internet content providers on a voluntary basis. A regime of voluntary self-rating based on a federally defined ratings system, or "vocabulary,"<sup>12</sup> combined with filtering software available to content consumers, will not only provide efficient and constitutionally permissible content regulation to Americans, but will actually further the cause of free speech the world over.

My analysis begins in Part I with a discussion of the many different forms (parental supervision, publication restrictions, and filtering) that Internet content regulation can take, concluding in Part II that the best content regulation is regulation that employs filtering technology and in which the responsibility for evaluating content for maturity is placed on the content's provider. I then discuss the importance of making such regulation voluntary. Part III continues the analysis by comparing government-sponsored regulation with private regulation. Because the First Amendment provides a safeguard against government, but not private, overreaching, because so many of the normal advantages to competition are not present in the market for Internet content regulation, and because of some other unique international benefits of federal Internet content regulation, I conclude that the federal government would be a better sponsor for Internet content regulation than the private sector engaged in competition. I consider the constitutional and international implications of government Internet content regulation in Part IV, a discussion that necessarily returns to the concept of voluntariness, considered for its economic superiority in Part II, as an essential component of any constitutional and internationally enforceable form of government Internet content regulation.

The first step toward explaining why federally sponsored voluntary self-rating is the best answer to the content

---

12. On ratings vocabularies generally, see J.M. Balkin, Beth Simone Noveck, & Kermit Roosevelt, *Filtering the Internet: A Best Practices Model*, at <http://www.law.yale.edu/infosociety/Filtering3.rtf> (last visited Aug. 28, 2000).

regulation question requires an examination of the different ways to regulate mature content on the Internet.

## I. ALTERNATIVE APPROACHES TO CONTENT REGULATION

### A. PARENTAL SUPERVISION

Calls for some form of Internet content regulation, at least when it comes to children, have been nearly universal. Even those who argue that the only solution is for parents to supervise their children's access to the Internet are arguing for a form of content regulation, a form of regulation in which the regulators are parents.<sup>13</sup> But this method of Internet content regulation is subject to disqualification as a viable alternative even on superficial examination because of its high cost coupled with its low effectiveness.

Very few parents have the time to supervise all of the time that their children spend on the Internet. Because the time commitment makes parental monitoring impractical for all but those few parents who can spend large chunks of time watching their kids surf the Internet, this system is impractical for all but the most privileged classes. Parental monitoring is not a real alternative for families in which both parents must, or choose, to work, or for those headed by a single parent. Parents with multiple children would have a difficult time monitoring the access of more than one child at a time, and the value of the Internet as a baby sitter would be nil.<sup>14</sup> Children, meanwhile,

---

13. See, e.g., Brief of Feminists for Free Expression as Amicus Curiae in support of Appellees, *Reno v. ACLU*, 521 U.S. 844 (1997) ("It is up to the parent, not the government, to make these decisions."); ROBERT B. GELMAN & STANTON MCCANDLISH, PROTECTING YOURSELF ONLINE: THE DEFINITIVE RESOURCE ON SAFETY, FREEDOM & PRIVACY IN CYBERSPACE—AN ELECTRONIC FRONTIER FOUNDATION GUIDE (1999) (guide from the Electronic Frontier Foundation, an Internet free speech group, providing ways for parents to regulate how children access the Internet); ACLU, *Fahrenheit 451.2: Is Cyberspace Burning? How Rating and Blocking Proposals May Torch Free Speech on the Internet*, <http://www.aclu.org/issues/cyber/burning.html> (last visited Sept. 1, 2000) ("[P]arents should take primary responsibility for determining what their children should access.") [hereinafter ACLU, *Fahrenheit 451.2*]; Center for Democracy and Technology, *Internet Family Empowerment White Paper* (July 16, 1997), <http://www.cdt.org/speech/speech/empower.html> (advising parents how to control their children's access to the Internet).

14. Depending on one's point of view, this could be a benefit of relying exclusively on adult supervision. There are not many strong arguments that

would have no hope of access at schools or libraries, and would be denied access even at home whenever there were no parent present. The parental supervision method does not even favor those parents who lack the technical skills necessary to use some kind of access-control software on their home computer; they would still need technology to disable Internet access when no one is around to supervise.

Another major disadvantage of the parent-over-the-shoulder system is its inability to *prevent* viewing of mature content. Parents can prevent their children from typing in “www.xxx.com,” or from clicking on an ad for pornography, but unless the parent were, for example, to open each World Wide Web page with the child looking away and only allow the child to view the page after a parental preview, there is no way to keep the child from taking in the content while the parent is evaluating its appropriateness.

This method does have one major advantage over practically any other method: the use of perfect criteria for exclusion. Because the parent him- or herself evaluates the content, there is no need to develop, for application by another entity, an approximation of the parent’s criteria for exclusion. But that advantage can’t possibly outweigh the violence such a regime does to children’s access to the Internet; the high cost of parental supervision in terms of both parental effort to supervise and children’s loss of access obviates the need for any further consideration of parental supervision as a viable Internet content-regulation regime.

The rest of the options for regulating access to mature Internet content fall into four categories, as determined by the answers to two questions, each of which has two potential answers: “How is access to mature content limited?” and “Who decides whether particular content is mature?”

---

the Internet is a good substitute for time with one’s parents, and the world might be a worse place if we make it easier for parents to avoid personal contact by providing the Internet as an option for entertaining their children. I will, however, make the usual economists’ assumption that increased choice is a good thing and leave to individual parents the decision of how much unsupervised time online is optimal for their children. Implementation of a more flexible regime for keeping kids from mature content will not keep parents who want to personally supervise their children’s online experience from doing so.



## B. PUBLICATION RESTRICTIONS AND FILTERING

## 1. Publication Restrictions

The first way to describe an Internet content-regulation regime is to describe how it prevents access to mature content. Traditionally, when society has wanted to prevent access to certain speech, it has imposed restrictions on the distribution of that speech by, for example, banning the distribution of obscene materials or child pornography.<sup>15</sup> Congress's first two attempts at Internet content regulation were this type of regulation: restrictions on the dissemination of certain content, or publication restrictions.<sup>16</sup>

Publication restrictions do not have to be absolute. The world is full of non-absolute publication restrictions, such as restrictions against disseminating indecent material to minors.<sup>17</sup> On the Internet, these partial publication restrictions have taken the form of requirements that content providers must somehow verify that they are allowing only adults to access mature content. A very popular method for doing so is to require potential content consumers to present a valid credit card number, apparently on the theory that only adults have access to credit cards.<sup>18</sup> Partial publication

---

15. *See, e.g.*, 18 U.S.C. §§ 1464-1465 (1994) (obscenity); 18 U.S.C. §§ 2251-2252 (1994) (child pornography).

16. *See* Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133 (codified in scattered sections of 47 U.S.C.) [CDA]. Congress's second attempt at Internet-specific content regulation was the Child Online Protection Act, included in a 1998 spending bill, which differed from the Communications Decency Act by restricting its application to commercial content offered on the World Wide Web and by using a different definition for the content subject to the Act. *See* Child Online Protection Act, Pub. L. No. 105-277, 112 Stat. 2681-736 (1998) (codified at 47 U.S.C. §§ 223, 230-231) [COPA].

17. *See, e.g.*, Communications Decency Act § 502(1)(a)(1)(B); Child Online Protection Act § 1403; *see also* Ginsberg v. New York, 390 U.S. 629, 641-43 (1968) (upholding a New York statute prohibiting the sale to children under the age of seventeen of materials that are harmful to minors).

18. *See* 144 CONG. REC. H9907 (daily ed. Oct. 7, 1998) (comments of Rep. Oxley) ("COPA requires commercial on-line pornographers to take steps to restrict children's access to adult material on the Web by requiring adult verification, such as an adult access code, PIN number, credit card numbers, or new technologies such as digital signatures when they become available."). Requiring a credit card in order to obtain access to covered material is a defense to liability under the COPA. Child Online Protection Act § 1403; *see also* Communications Decency Act § 502(2)(e)(5)(B) (containing a similar

restrictions are usually designed to prevent either the inadvertent consumption of mature content or the consumption of mature content by children.

But publication restrictions were created to operate in physical space, a place that does not allow for many other forms of regulation. While the Internet is often thought of as having few rules, it actually allows for the promulgation of rules that the physical world would be hard-pressed to support.<sup>19</sup> Responding to the demand for content regulation, and recognizing the Internet's facility for accommodating very strict rules, interested parties have taken advantage of how the Internet displays information to create an alternative system of content control that could not exist in the physical world: filtering.

## 2. Filtering

Filtering works by having the device through which one views content (in this case Internet software, such as a Web browser or an e-mail program) selectively refuse to display certain content. It is only possible to use filtering for content being viewed through some kind of machine; there is no way to make a billboard along an interstate visible only to some of the people driving past it.<sup>20</sup> In the most general terms, Internet content filtering is accomplished by using a piece of software to compare information about a piece of content with a set of filtering criteria before displaying the content on the user's computer monitor. This technology is known as "filtering" or "filters" because the browser lets only certain content "through" the filter to the person viewing the content. Content that does not meet the criteria is screened by the filter before it reaches the user.

Internet content filtering can be classified into four categories. The challenge of filtering is obtaining information about the content to be run through the filter, and I define these four categories of Internet filtering according to how they obtain information about content.

---

provision).

19. See generally LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999) [hereinafter LESSIG, CODE].

20. See Lawrence Lessig, *What Things Regulate Speech: CDA 2.0 vs. Filtering*, 38 JURIMETRICS J. 629, 637 (1998) (arguing that the characteristics of a particular technology may make increased regulation possible) [hereinafter Lessig, *What Things Regulate Speech*].

Two methods—"blacklisting" and "whitelisting"—work very similarly; both rely on separately maintained lists of Internet sites. Under blacklisting, access is given to all sites except those listed on the "black" list. Whitelisting is the converse—access is blocked to all sites except those listed on the "white" list.<sup>21</sup> Under both blacklisting and whitelisting, the information about the content must be collected by humans and incorporated into the appropriate list.

A third method, what I call "content-examination software," relies not on humans but the software itself to examine the content as it is received by the viewer's computer, either by blocking certain words or phrases as they are encountered or by blocking the display of all content at a particular Internet address if it contains certain words or phrases.<sup>22</sup>

---

21. Cyber Patrol is a product that provides both blacklisting and whitelisting by relying on various "CyberLISTs" to control access to Internet content. See *CyberLISTs*, at <http://www.cyberpatrol.com/cybernot/cylist.htm> (last visited Sept. 1, 2000). One of the CyberLIST blacklists is the CyberNOT blacklist. See *id.* Inappropriate sites for children (as evaluated in 12 categories) are listed in the "CyberNOT" database and are blocked. *Id.* There are also the "Internet List" blacklist to "manage use of online services such as free e-mail, free web pages, message/bulletin boards, search engines and 'web chat'" and the "Productivity List" blacklist "of material typically considered by businesses to be non-work related, such as vacation planning or on-line stock trading." *Id.* Thus, Cyber Patrol offers content regulation not only according to the content's maturity but also along other criteria. Cyber Patrol's whitelist, the "Kid's List," on the other hand, is a listing of Internet sites that Cyber Patrol thinks are appropriate for children; the list "can be used by parents and teachers to guide children to safe educational sites, such as online museum tours, or photographs of outer space." *Id.* It is up to the software user whether to block sites on one or all of the blacklists or restrict access only to Kids' List sites. See *id.* Another product, Net Nanny, has an optional "Can Go" feature that operates as a whitelist. See *Frequently Asked Questions About Net Nanny*, at <http://www.netnanny.com/Support/NNFAQ.asp> (last visited Aug. 27, 2000) [hereinafter *Net Nanny FAQ*]. Although Net Nanny provides other filtering options, use of a Can Go list will prohibit viewing of any content not on the Can Go list, even if it would otherwise satisfy Net Nanny's filtering criteria. See *id.*

Whitelists and blacklists can be implemented at different levels. The People's Republic of China is looking to whitelists implemented at the single point of connection between the Chinese portion of the Internet and the rest of the network in order to keep Internet users in China from seeing any content not approved by the government. See Joseph Khan et al., *Chinese Firewall: Beijing Seeks to Build Version of the Internet that Can Be Censored: Crackdown on Outside Views also Includes Satellite TV and Financial News Wires; Rule of Throat and Tongue*, WALL ST. J., Jan. 31, 1996, at A1.

22. Net Nanny provides a range of options for any filtering "violation," including violations stemming from its content-examination feature. See *Net*

The fourth method, ratings-based filtering, relies on the application of ratings to particular content, with the Internet-viewing software being set to exclude content if it has been assigned a particular rating. The rating can be applied to the content in a number of ways. One way is for the rating to be stored in a separate table and checked when the content is downloaded.<sup>23</sup> Another way is for the rating be attached, or “tagged,” to the content itself; the Internet software then reads the tags as the content streams into the viewer’s computer.<sup>24</sup> The software checks the information contained in the tags against its own list of acceptable ratings-based criteria and only displays the content if it falls within those criteria. Although not a device designed for the Internet, the V-Chip uses a similar kind of filtering, relying on broadcasters to use part of their signal to broadcast a rating of the visible content being carried by that signal and then using that rating to determine whether or not to display the content.<sup>25</sup> As with

---

*Nanny FAQ*, *supra* note 21. The software can do anything from log the violation to shut down the viewing application. *Id.*

23. This is essentially how Cyber Patrol’s CyberNOT list works. Sites that fail Cyber Patrol’s rating process are listed in the CyberNOT list, which is downloaded to the user’s computer. *See Cyber Patrol 5.0*, at <http://www.cyberpatrol.com/fact.htm> (last visited Aug. 27, 2000). The software then checks the address of the content being downloaded with the address in the CyberNOT table. *See id.* If the address is in the table, the software refuses to display the content. *See id.* Cyber Patrol’s ratings are crude because, while Cyber Patrol evaluates content on 12 criteria, users are only given the black-and-white decision of whether to block based on Cyber Patrol’s overall recommendation; there is no way to selectively filter content based on some of Cyber Patrol’s criteria.

24. The content viewer himself does not see the rating; it is carried in a portion of the data stream used by the computer to process the data that will be displayed. This data about the underlying displayed data, or metadata, contains a great deal of information that the user never sees—ratings are just one type of such data. Nicholas Negroponte refers to information about a piece of content contained in its “header” as the “bits-about-bits.” NICHOLAS NEGROPONTE, *BEING DIGITAL* 18 (1995).

Still another method of filtering involves altering the *address* of the site if it contains mature content. Thus, one industry participant has proposed legislation requiring that every Web site with mature content append “.adult” to the end of its uniform resource locator (URL). *See Hearings on Internet Indecency Before the Senate Comm. on Commerce, Sci., and Transp.*, 105th Cong. 1, 19-20, 144 CONG. REC. S8611 (Feb. 10, 1998) (statement of Seth Warshavsky, Chief Executive Officer, Internet Entertainment Group, Inc.). Thus, “www.xxx.com” would become “www.xxx.com.adult” or simply “www.xxx.adult.” *See id.* Browsers could then be set to exclude any site ending in “.adult.” *See id.*

25. *See generally* Matthew L. Spitzer, *An Introduction to the Law and*

whitelisting and blacklisting, human intervention is required to assign a rating.

On the Internet, tagging has most commonly been implemented through a standard called the Platform for Internet Content Selection, or "PICS." PICS is simply a specification for attaching tags to Internet content.<sup>26</sup> What makes PICS so interesting is what it is not. PICS is a *technical* solution to the problem of how to rate content, but PICS is not a policy proposition about how to rate particular content. As such, PICS divorces the choice of *method* for filtering from the *ratings system* applied to content. Using PICS, content can be rated according to any content-ratings system, and content consumers can choose to view content rated under whichever ratings system they think best reflects their values.<sup>27</sup> PICS just carries the rating in a way that the Internet software understands.<sup>28</sup>

Of course, content raters and content consumers must agree on a ratings system, or the ratings published by the rater will be meaningless to the consumer's Internet software. It is in response to this need that several ratings systems have sprung up around PICS. One of the most popular is the Recreational Software Advisory Council ratings system for the World Wide Web, or "RSACi." RSACi provides a set of categories as well as ratings criteria within each category.<sup>29</sup> If

---

*Economics of the V-Chip*, 15 CARDOZO ARTS & ENT. L.J. 429 (1997).

26. See generally World Wide Web Consortium, *Statement on the Intent and Use of PICS: Using PICS Well*, <http://www.w3.org/TR/NOTE-PICS-Statement> (June 1, 1998) [hereinafter *Using PICS Well*].

27. *Id.*

28. In this sense, PICS mirrors the end-to-end architecture of the Internet itself. See *supra* text accompanying note 1. PICS does not provide a ratings application, it just provides a way to transmit ratings information across the Internet for use by another application. Timothy Wu, Essay, *Application-Centered Internet Analysis*, 85 VA. L. REV. 1163, 1163-64 (1999) [hereinafter Wu, *Application-Centered Internet Analysis*].

29. The RSACi system has four categories, Violence, Nudity, Sex, and Language, and five ratings for each category, level zero through level four. See Internet Content Rating Association, *About ICRA*, at <http://www.icra.org/about.html> (last visited Aug. 28, 2000) [hereinafter *About ICRA*]. In April of 1999, RSACi and its author, the Recreational Software Advisory Council, were folded into the Internet Content Rating Association (ICRA). Internet Content Rating Association, *RSAC/ICRA Timeline*, at <http://www.icra.org/press/timeline.html> (last visited Aug. 27, 2000) [hereinafter *RSAC/ICRA Timeline*]. Although the ICRA plans to eventually release a new system, the RSACi ratings vocabulary is still extant. Because the RSACi user agreement still refers to the owner of RSACi as RSAC, I will

they agree to use the RSACi ratings vocabulary, both content raters and content consumers know that a rating of “2” in the “Sex” category means “Clothed sexual touching.”<sup>30</sup> The rating is carried in PICS tags attached to the content. In this way, RSACi provides a way for content providers to tell content consumers about the maturity level of their content.

Although the four methods differ in many ways, blacklisting, whitelisting and ratings-based filtering are similar in (and can be distinguished from content-examination software by) their reliance on humans to evaluate content. That human content evaluation can be done by the content provider himself or by a third party. Most uses of tagging, for instance, involve self-rating by the content provider. Content providers rate their *own* content, often using someone else’s ratings vocabulary, and affix that rating to their content. As mentioned above, use of RSACi ratings carried by PICS tags is the dominant tagging method.<sup>31</sup> The Cyber Patrol system, on the other hand, is an example of third-party content rating. Cyber Patrol’s independent content raters rate World Wide Web sites and Cyber Patrol’s customers download Cyber Patrol’s ratings (in the form of lists of sites, the CyberNOT, Internet, and Productivity lists, that have been rated as unsuitable) and store them on their own local computer. It is up to the owner of the filtering software to decide whether to block the content on Cyber Patrol’s blacklists.<sup>32</sup>

Each method of filtering has obvious shortfalls. Given the Internet’s dynamic character, blacklisting alone results in exposure to a great deal of unwanted mature content because it takes time for new mature content to be added to the blacklist. Because blacklisting excludes only *identified* mature content, new mature content will be accessible until it has been identified as such. Whitelisting has just the opposite problem: children will be denied access to new non-mature content until the content evaluators get around to adding it to the whitelist. The problems with content-examination software provide more entertainment value than other methods of filtering. Humorous stories abound highlighting the odd filtering

---

follow the same convention.

30. *About ICRA*, *supra* note 29.

31. See James V. Dobeus, Comment, *Rating Internet Content and the Spectre of Government Regulation*, 16 J. MARSHALL J. COMPUTER & INFO. L. 625, 641 n.97 (1998).

32. *Cyber Patrol 5.0*, *supra* note 23.

decisions made by content-examination software, from removing the word “homosexual” in the sentence “President Clinton opposes homosexual marriage”—leaving the unintended “President Clinton opposes marriage”—to the blocking of the Web site for the Archie R. Dykes Medical Library.<sup>33</sup>

The inability of any one system to adequately filter has led most private providers of filtering software to rely on a combination of methods. Net Nanny relies, for example, on blacklisting, whitelisting, and content-examination software.<sup>34</sup> The non-profit world has focused on ratings-based filtering with PICS,<sup>35</sup> but a new proposal would combine ratings-based filtering with whitelisting and templates offered by special interest organizations. The idea behind this proposal is that the different kinds of filtering would combine to form a ratings vocabulary that is both robust and customizable to the tastes of every content consumer.<sup>36</sup>

### 3. Differences and Similarities

To the content consumer, the effect of the two methods—publication restrictions and filtering—is identical; consumption of mature content on the Internet is controlled, or regulated. Publication restrictions attempt to control the flow of mature content at the source by restricting what and, in the case of non-absolute publication restrictions, “where”<sup>37</sup> the content provider can publish. Filtering attempts to control the flow of mature content at the content’s target, the content consumer’s computer, although some systems require the content provider’s cooperation because he must apply a rating to his content.

---

33. See generally Jonathan Weinberg, *Rating the Net*, 19 HASTINGS COMM. & ENT. L.J. 453, 461-62 (1997) (describing several instances of unfortunate or inadvertent filtering).

34. *Net Nanny FAQ*, *supra* note 21.

35. See, e.g., *About ICRA*, *supra* note 29 (discussing use of PICS tags for the privately sponsored RSACi ratings system).

36. Balkin, Noveck, & Roosevelt, *supra* note 12, § 3. This filtering proposal, which would rely on a combination of different private ratings systems, is susceptible to the same criticisms generally leveled against reliance on private Internet content regulation. See *id.*

37. This is not to say that the restriction is on publication in a certain geographic location, rather it is a restriction on publication that is not somehow limited by access controls. The appearance to the user, however, is that the access controls serve as a barrier, preventing the user from “reaching” the content.

So the two potential answers to the first question, “How is access to mature content limited?” are “Filtering” and “Publication restrictions.”

### C. THE IDENTITY OF THE CONTENT EVALUATORS

The second question asks who is responsible for evaluating the maturity of the content. Under a filtering regime, as mentioned above, it is possible for either the content provider or a third party to affix a rating to content published on the Internet. For example, if the filtering software is designed to check a database of authorized sites, that database is usually maintained by a third party who markets not only the software to allow filtering but also access to their list of acceptable sites. Cyber Patrol works in exactly this way, charging a subscription fee for continued updates to its blacklists.<sup>38</sup> The same goes for the list of bad words that content-examination software uses to screen certain pages; someone has to decide which words are bad enough to warrant blocking access to the content. The reason for using third parties to determine what sites or words are acceptable is one of necessity; if parents were required to do it themselves, we would wind up with a regime whose costs are almost as high as direct parental monitoring.

But some regimes place responsibility on the content provider for determining how its content fits into the maturity continuum. The Communications Decency Act and the more recent Child Online Protection Act fall into this category.<sup>39</sup> By holding content providers liable for giving minors access to mature content, the CDA and the COPA place the onus on content providers to evaluate their own content. Although it is possible that, if the government were to bring a case against the content provider, a judge or jury may *re-evaluate* that content to determine whether it falls within the relevant statute’s ambit, the vast majority of the content-evaluation work will fall to content providers themselves. Of course, evaluation by the content provider is not limited to publication restriction regimes like the CDA or the COPA. Most current implementations of tagging, for instance, envision the content provider placing a tag on his content, similarly putting on the provider the duty to evaluate his own content.<sup>40</sup>

---

38. See *Cyber Patrol 5.0*, *supra* note 23.

39. See *supra* note 16.

40. The RSACi ratings system requires the content provider to answer



Thus, excluding direct parental monitoring, which I have already disqualified as both expensive and impractical, the answer to this second question, "Who evaluates the content?" is either "the content provider" or "a third party."

## II. EVALUATING THE ALTERNATIVES

The answers to the two questions posed by the last part form a matrix that demonstrates that filtering based on self-rating is the optimal form of Internet content regulation. The horizontal component of that matrix contains the two possible mechanisms, filtering or publication restrictions, while the vertical component contains the two possible content evaluators, the content provider or third parties. It looks like this:

	Filtering	Publication Restriction
Content Provider Evaluates Maturity	I	II
Third Party Evaluates Maturity	III	IV

By analyzing how placement in each cell affects the merits of a particular Internet content-regulation regime, it is possible to determine which type of regime is the best.

### A. PUBLICATION RESTRICTIONS BASED ON THIRD-PARTY RATING

We can exclude quadrant IV, publication restrictions combined with third-party rating, out of hand on both ideological and economic grounds. Quadrant IV would prohibit the publication of content on the Internet that some third party had not previously determined to be suitable for the general

---

questions on a form at the RSACi web site to obtain a rating. The answers to the questions are in-turn run through a computer program to create a PICS tag that the content provider copies onto his content. See Internet Content Ratings Association, *Rate Your Site With RSACi*, at <http://www.icra.org/rate1.html> (last visited Aug. 27, 2000). In this way, RSACi is a hybrid because, while the content provider has some discretion over how to describe its content to the RSAC Web page, the provider does not have discretion to alter the rating generated by the page. Even under RSACi, however, the *responsibility* for rating remains with the content provider.

public. All of the third-party content evaluators on the Internet today are private, and absent state action, such a regime would be safe from constitutional challenge.<sup>41</sup> But whether it is a private organization or the government that one must seek permission from before publishing on the Internet only determines whether the regime is merely offensive or actually unconstitutional. Such a scheme might work for small, select parts of the Internet, but it is *prima facie* absurd to insist that every Internet content provider must find an organization willing to certify its content as acceptable for general consumption before publishing.<sup>42</sup> Such a regime would result in great cost: those who could not afford to hire someone to review their content would be shut-out of the Internet, effectively eliminating the inexpensive free expression that has distinguished the Internet from traditional forms of publication. There has to be a regime superior to quadrant IV.

The other quadrants of the matrix are not dealt with so handily. Instead of testing each outcome, which would require evaluating the two questions in combination, I will take the simpler approach of analyzing each of the two choices represented by the matrix separately. I will first examine whether content providers or third parties should be responsible for providing whatever content evaluations are necessary for any content-regulation regime to function. Next I will evaluate the relative merits of publication restrictions and filtering. The combination of the two best answers (self-rating versus third-party rating and filtering versus publication restrictions) will lead to the best possible result within the matrix.

#### B. CONTENT-PROVIDER EVALUATION VS. THIRD-PARTY EVALUATION

There are arguments favoring both content providers and third parties as the source of content evaluation. For instance, content providers have better information about their content, but third parties, by specializing in content evaluation instead of in content creation are likely to have an advantage in

---

41. State action in the form of a requirement that one must seek permission from a private entity before publishing would render the regime unconstitutional. See Balkin, *supra* note 11, at 1160-62.

42. Remember, Internet content is far from static, and re-approval would be required every time the content is changed. The ability to rapidly change already-existing content is one of the major features of the Internet.

evaluating the content once it is identified. Professional third-party content evaluators, as opposed to individuals and small businesses publishing Internet content, are likely to be more responsive to consumer feedback in the form of boycott or litigation, making them more sensitive to possible errors in their evaluations. But not all errors will be responded to equally. Third parties, parents, and government will be inordinately interested in correcting content-evaluation errors that result in exposure to unwanted content; only content providers have the incentive to prevent a third-party evaluator from screening too much content. It is possible to have the best of both worlds: if the responsibility for evaluating content is placed upon content providers, they will be free to employ third parties to perform content evaluations. At the same time, a regime that places the burden of evaluating content on content providers also allows for an efficient mechanism for determining which content is worth the cost of evaluation by allowing content providers to pass that cost on to content consumers.

#### 1. Separating Responsibility for Evaluating from Performance of the Evaluation

One obvious advantage of content-provider evaluation over third-party evaluation is that it is much less expensive. One of the reasons why the software-based third-party content evaluation systems currently available are so limited is because the cost of third-party content evaluation is so high. No one has better information about the content than its creator. Third-party content evaluators must incur the cost of learning what content a particular provider has to offer. Content providers, on the other hand, have this information at practically no cost, having already obtained it as a by-product of creating the content.

A second important component of the creator's cost advantage over third parties is knowledge of change. One of the most powerful aspects of the Internet is its ability to change, an aspect on which Internet content providers often capitalize. If third parties are going to evaluate Internet content accurately, they will have to identify each time the content changes. On the relatively stable World Wide Web, this may only be difficult, but on Internet applications such as chat rooms and e-mail, it will be impossible. Because knowledge about whether content has changed is relatively

expensive to obtain, third-party content evaluators are much less likely to provide timely, and therefore accurate, content evaluations.<sup>43</sup> Third-party content evaluation would kill dynamic Internet content, save for only the very most popular and relatively static.

The biggest advantage of third-party content evaluation is that it allows for economic specialization.<sup>44</sup> Those who create Internet content are not necessarily the best at evaluating it. Third-party evaluations would allow individuals, and organizations, to specialize—some as content providers and some as content evaluators. Those who specialize in evaluating content would be able to do it at a lower cost than those who specialize in something else, like creating content. At the same time, content creators would be able to use for improving their content-creation skills those resources that they would have devoted to developing their content-evaluation skills. The result should be an increase in content relative to a content-provider-evaluation regime because the complete cost of publishing content on the Internet (the cost of creating the content plus the cost of the evaluating it) would be lower.

But the advantages of economic specialization can also be captured by content-provider evaluation. “Content-provider evaluation” is merely an allocation of the *responsibility* to evaluate content, not a directive that one must personally evaluate one’s own content. Just as a general contractor hires subcontractor specialists, a content provider who is responsible for producing Internet content can choose to subcontract for content-evaluation services. To be sure, the duty of the content provider to the consumer may be of a different nature than that of a general contractor (it may be in tort instead of in contract, or it may be criminal liability to the government), but that’s hardly a reason for denying content providers access to a market for content evaluation. Even though content providers would be responsible for evaluating their content, they could still use the skills of third-party content evaluators when economically advantageous.

---

43. See, e.g., Weinberg, *supra* note 33, at 471 (asserting that the most ephemeral Web sites are likely to be the ones carrying mature content).

44. On economic specialization, see ADAM SMITH, *THE WEALTH OF NATIONS* 19-23 (Prometheus 1991) (1776). But see Weinberg, *supra* note 33, at 470-71 (noting that as content-evaluation services get bigger, their *consistency* will degrade because it will be harder to maintain the same evaluation ideals across the many content evaluators employed by the service).

By creating a relationship between content providers and third-party content evaluators, the cost of content evaluation can be reduced. Content providers will be able to assist their third-party evaluators by, for instance, giving notice of both the timing and type of changes to their content.<sup>45</sup>

## 2. Extra-Competitive Feedback

Third-party content evaluators would also make good objects of extra-competitive feedback. By “extra-competitive feedback” I mean that feedback beyond that generated by normal competition in the market (such as lawsuits, protests, and boycotts). While many content providers are either hobbyists or have very small businesses with little or no assets, entities who have invested enough in their reputation to warrant reliance by others in their content-evaluation skills are more likely to have enough assets to make them worthy targets of litigation, and be easier to identify for the purpose of a boycott or a legal action, in the event that they mis-rate. If they have something to lose, and their larger size makes them easier to find, they will be more careful about their evaluations. If the party who performs the content evaluation faces a credible threat of litigation or boycott, it is much more likely to perform accurate content evaluations.

Like the gains from specialization, however, there is no reason why this advantage cannot be captured in a regime where the responsibility for content evaluation falls on content providers. Indeed, making content providers responsible for evaluating their own content would result in *more* extra-competitive feedback to content providers than under a straight third-party content-evaluation regime because content providers most clearly realize the harm caused by inaccurate content evaluations.

## 3. The Interest in Accurate Content Evaluation

Of all the parties with an interest in content evaluation, content providers are the best suited to manage that process. Three parties are interested in having Internet content evaluated accurately: parents, whose interest is in sheltering

---

45. Some of this benefit may be realizable in a regime in which third parties have the primary responsibility for evaluating content. Third-party evaluators that are particularly popular will be able to condition their willingness to evaluate particular content on the content provider's agreement to provide information about changes.

their children from mature content; society, which has an analogous interest in sheltering children from mature content;<sup>46</sup> and the content provider, because it has an interest in making the content available to the widest audience (an interest best served by a non-restrictive evaluation) while not upsetting parents and society, who may demonstrate their dismay by providing extra-competitive feedback to the content provider (an interest best served by a restrictive evaluation). Whether the evaluation is overly or inadequately restrictive, the content provider is the most reliable party to address the inaccuracy.

While parents may have an interest in regulation, they actually have very little incentive to rely on extra-competitive forces to correct an inaccurate evaluation. Individual parents will face all the usual coordination problems in building a coalition powerful enough to provide meaningful feedback in the form of protest or boycott, and will not fare much better if they rely on the legal system to provide that feedback: If the evaluation is insufficiently restrictive, then the harm is that a child will view content that was overly mature. But the process of fashioning a civil remedy for the psychological damage done to a child by viewing mature content would be tremendously speculative and, consequently, subject content evaluators to uncertain risk.<sup>47</sup> Complicating matters further, different parents will make different decisions about the content that should be kept from their children. If the content-regulation regime is designed to enhance parents' ability to choose what content their children view, then the legal system will have to find a way to rationalize those choices when determining how much of a remedy to provide for those who have viewed incorrectly evaluated content.

Needless to say, however, the damage to a child from viewing any particular content is likely to be, at least financially, slight. If we are going to rely on normal rules of civil liability, no single parent will have an adequate interest in pursuing a remedy against an inaccurate content evaluator.

---

46. Society's interest is evidenced by laws prohibiting the dissemination to children of content that is harmful to minors. *Cf. Ginsberg v. New York*, 390 U.S. 629, 636-37 (1968) (upholding a New York statute prohibiting the sale to children under the age of seventeen of materials that are harmful to minors).

47. *See, e.g., Consolidated Rail Corp. v. Gottschall*, 512 U.S. 532, 551-52 (1994) (adopting restrictive common law test for damages in cases of emotional distress because of the possibility of subjecting defendants to "infinite liability").

Instead, we would have to rely on facilities like class actions, which have their own set of problems.<sup>48</sup>

Society, by attempting to aggregate the harm suffered by the many children who view mature content, is a more likely complainant against an inadequately restrictive evaluation. In the legal system, society acts principally in the form of government, and the state is a much more practical plaintiff than parents in a lawsuit for inaccurate content evaluation. If we assume that government is a perfect vehicle for aggregating the harm to individual children from viewing overly mature content, perhaps government lawsuits are a way to provide extra-competitive feedback to third-party content evaluators who issue inadequately restrictive evaluations. But, again, there is no reason why government cannot provide this feedback to content providers themselves, who can pass it on to their contracted third-party content evaluators. In this way, professional content evaluators would operate somewhat like insurance companies or bonding services, pooling resources to satisfy harms caused by the mis-rating of Internet content.

But content providers are an even better source of both competitive and extra-competitive feedback to third-party content evaluators who provide inadequately restrictive content evaluations. Although a single parent's dismay at an inadequately restrictive evaluation may be insufficient to support a boycott or warrant legal action, the content provider's role as an obvious target for parents' chagrin makes the content provider an excellent candidate to aggregate the many small harms felt by unintentional viewers. Facing complaints and possibly reduced traffic to their content, content providers would have an interest in making sure third-party content evaluations are adequately restrictive, reducing the need for government to provide such feedback while surpassing the ability of parents to do so.

The superiority of content providers as a source for feedback to third-party content evaluators becomes even more apparent when one considers the problem of an evaluation that is *overly* restrictive. The ability of parents or government to provide extra-competitive feedback is considerably less certain if the evaluation is overly restrictive. In addition to the above-

---

48. See, e.g., *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298-99 (7th Cir. 1995) (listing various sources that illustrate many problems with class actions).

mentioned problems with imposing liability for inadequately restrictive evaluations, there is the difficulty of quantifying the harm suffered from an overly restrictive evaluation: lost access to the content. Quantifying how much a family should be paid because a child was unable to view particular content is a troublesome task to say the least. Coalitions of parents and concerned citizens are likely to be concerned primarily with protecting children from mature content and are therefore *unlikely* to expend much effort to attack third-party content evaluators for being overly conservative; such groups will focus their efforts to correct inaccurate content ratings that result in children being exposed to mature content. And allowing the government to impose legal sanctions on someone for failing to provide access to content is at best constitutionally dubious.

Unlike parents or citizens' coalitions, content providers have a direct incentive to remedy the reduced traffic that would result from an overly restrictive content evaluation. Only content providers have real incentives to prevent both inadequately and overly restrictive ratings. Ratings that are neither too restrictive nor too lax are, like Goldilocks said, "just right," which means that content providers' combination of incentives makes them the only participants in the market for ratings who have an incentive to produce truly *accurate* content ratings.

#### 4. The Power of Contract

If content providers naturally provide a good conduit for feedback to third-party content evaluators, why not make them primarily liable and allow them access to one of the best tools society has for delivering that feedback: contract. Content providers can use the power of contract to increase their power to police the accuracy of third-party content evaluators in two ways:

First, it will reduce both kinds of evaluation inaccuracies. Content providers can use contract to compensate third-party content evaluators—to choose a third-party evaluator for their content. If third-party content evaluators are dependent for their income on the creators of the content they evaluate, then the power of content providers to choose among content evaluators will sensitize evaluators to both overinclusive and underinclusive content-evaluation inaccuracies. If third-party content evaluators are the agents of content consumers, as is generally the case today, they will only be sensitive to one type



of evaluation inaccuracy: an inadequately restrictive evaluation.

Second, contract provides both an instant duty and instant jurisdiction between content evaluator and content provider. Content providers who have to rely on tort principles in order to address inaccurate third-party content evaluators will face an uphill battle. There is no reason why third-party content evaluators have to be located within jurisdictional reach of any particular court; part of the Internet's power is its ability to eliminate the constraints of geography. But obtaining jurisdiction over a distant third-party content evaluator would be easy if content provider and content evaluator agree to a forum in a contract between them.<sup>49</sup> As with the benefit of economic specialization, the availability of extra-competitive feedback cuts in favor of placing the duty to evaluate content on the content provider.

##### 5. Allocating the Cost of Content Evaluation

Just as content providers are the ideal aggregators for consumer complaints over inaccurate evaluations, they are also the ideal entities for aggregating the price of content evaluation. Evaluating content for maturity is, and will be, a process with some cost. Some content may not be worth evaluating because it does not create enough benefit to support that cost. If the content is valuable enough to support evaluation, then content providers should be able to offset the cost of evaluation by marketing the content, either directly to content consumers or to advertisers who hope to reach those viewing the content.

With so many advantages for content-provider evaluation over third-party evaluation, the only conclusion to draw is that any regime of Internet content regulation should place the responsibility for evaluating content on content providers. The

---

49. See, e.g., *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 596-97 (1991) (holding that the forum-selection clause contained in cruise tickets was enforceable). The converse is also true. Third-party content evaluators will be sensitive to the possibility that they could be haled into courts across the country—or even across the globe—on the basis of inaccurate evaluations that injure parties with whom they have no direct relationship. The use of forum selection, choice of law, and limitation of liability clauses to reduce that risk will reduce the overall risk of offering, and hence the cost of providing, content evaluations.

next question is whether those evaluations should be realized by relying on filtering<sup>50</sup> or publication restrictions.

### C. PUBLICATION RESTRICTIONS VS. FILTERING

#### 1. Choice-Maximization and Effectiveness

As an initial matter, it is difficult to identify a choice-based advantage of publication restrictions over filtering. Obviously, absolute publication restrictions, or flat prohibitions against publishing certain content, offer no choice at all. Neither the content provider nor the consumer has a choice about what to publish or what to consume. But publication restrictions need not be absolute. Neither incarnations of federal Internet content regulation are absolute prohibitions on publishing mature content; both incorporate defenses for those who take certain steps to prevent children from accessing mature content and therefore both would allow adults to publish and consume mature—but otherwise legal—material on the Internet.<sup>51</sup>

But even putting aside absolute publication restrictions, a modified publication restriction still drastically reduces choice over a filtering regime. The question posed by a publication restriction regime calls for a binary response: Can this be published? Modified publication restrictions alter the question slightly (“Can this be published without safeguards to prevent children from accessing it?”), but the answer is still either yes or no. Consumers, similarly, are faced with a question under

---

50. Third-party evaluation does have one major advantage over content-provider evaluation: choice of filtering architecture. If we rely on filtering and place the responsibility on content providers for evaluating their content, then only one method of filtering, ratings-based filtering using tags, is practical. This is because the other methods all require the cooperation of some third party. Whitelists and blacklists require that someone compile the lists, and the goal of content-evaluation software is to remove the need for *anyone* to rate particular content, much less the content provider himself. Of course, under a regime in which content providers have the responsibility to evaluate their own content, they could contract with third parties to use any of the filtering methods, but only ratings-based filtering (and in particular tagging) allows the content providers to evaluate their content without the help of a third party. There may still be role for these other methods, however, if they are used in addition to tags. *See infra* note 58.

51. *Compare* Communications Decency Act of 1996, Pub. L. No. 104-104, § 502(2)(e), 110 Stat. 133 (codified at 47 U.S.C. § 223(e)), *with* Child Online Protection Act, Pub. L. No. 105-277, § 1403, 112 Stat. 2681-736 (1998) (codified at 47 U.S.C. § 231(c)). Although the Supreme Court criticized the affirmative defenses available under the CDA, *see Reno v. ACLU*, 521 U.S. 844, 881-82 (1997), Congress did little to alter those defenses in the COPA.

publication-restriction regimes that only allows for two possible answers: Do I access areas of the Internet that contain mature content?

Filtering, by contrast, offers the ability to answer the publication and consumption questions along a continuum. The RSACi system uses a 4 x 5 matrix to rate content. Content is rated in four categories—nudity, language, violence, and sex—and evaluated on a scale of 0-4 in each category, 4 being the most mature.<sup>52</sup> Users can then determine how selective they want to be for each criteria. By using five ratings levels for four ratings categories the RSACi system allows users six hundred choices compared to Congress's two.

Although it may be theoretically possible to create a publication-restriction regime that avoids the problem of binary content evaluation, implementing it is an exercise in fantasy. The CDA and COPA draw the line for access to mature content at adulthood.<sup>53</sup> The 18-year-old cutoff ignores the fact that, while there is surely content on the Internet that is suitable for most 16-year-olds but not for most 6-year-olds, there is no reasonably effective way for content providers to determine whether a viewer is six or sixteen. The tools available on the Internet for separating adults from minors are crude enough.<sup>54</sup> What "reasonable" mechanism could content providers put in place that would allow them to exclude 6-year-olds but not 16-year-olds?<sup>55</sup>

---

52. See *About ICRA*, *supra* note 29. The system mirrors the system previously developed by RSAC to rate the content of video and computer games, and some have argued that it is flawed for that reason. See Balkin, Noveck, & Roosevelt, *supra* note 12, § 3.3; Weinberg, *supra* note 33, at 467 n.65; Dobeus, *supra* note 31, at 643. For a comprehensive background of the RSACi system, see generally C. Dianne Martin & Joseph M. Reagle, *An Alternative to Government Regulation and Censorship: Content Advisory Systems for the Internet*, 15 CARDOZO ARTS & ENT. L.J. 409 (1997).

53. See Communications Decency Act § 502(1)(a)(1)(B); Child Online Protection Act § 1403.

54. See Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 504 (1999) [hereinafter Lessig, *What Cyberlaw Might Teach*]. The market could respond with sites that, while being on the mature side of the line, advertise that they only publish content that is somewhat mature. Thus, society could rely on publication restrictions like the CDA to prevent accidental or unauthorized access to that content, but rely on a ratings system to help consumers decide how mature they want their Internet experiences to be. Even so, it would be very difficult to provide the kind of choice presented by the RSACi ratings system.

55. Both the CDA and the COPA provide for a defense based on the use of "reasonable" measures to prevent access by minors. See Communications

Publication restriction regimes are also plagued by the problem of “hard-coded,” or literal, values.<sup>56</sup> Age-based publication restrictions hard-code the prohibition against viewing certain content with a particular age cutoff without regard to variations between individual content consumers. Filtering, on the other hand, provides information about content, but leaves the determination of appropriateness as a variable whose value can be determined by that individual or, in the case of minors, by that individual’s parents.<sup>57</sup> In this way, ratings-based filtering allows greater variability in how we regulate mature content, both over time—as society changes its collective beliefs about what content is appropriate for what age—and among individuals.<sup>58</sup>

Hard-coded age restrictions are particularly inappropriate because there are practically no questions about which views

---

Decency Act § 502(2)(e)(5)(A); Child Online Protection Act § 1403. One commentator has proposed a system for determining the age of all Internet users. *See infra* text accompanying notes 63-68.

56. Computer programmers use the term “hard-coded” to describe the use of constants whose value is embedded in computer programs instead of using values that are open to re-definition by later users or programmers. *See* MICROSOFT PRESS COMPUTER DICTIONARY 226 (3d ed. 1997). Almost always, the better practice is to use named fields that are populated with the required value because the value contained in a named field can be easily redefined based on differing needs. STEVEN C. MCCONNELL, CODE COMPLETE 250 (1993). Thus, it would be better to have a field named “current\_year” whose value is populated with “2000” when a program is run instead of simply using the number “2000” each time the program needs to use the value for current year. When 2001 comes along, it will be much easier to adapt the program to the new year.

57. C. Dianne Martin and Joseph Reagle label the difference between a system that describes content and allows a choice as to appropriateness and one that contains appropriateness determinations within the rating as the difference between “descriptive” and “evaluative” ratings. *See* Martin & Reagle, *supra* note 52, at 412; *see also* Fernando A. Bohorquez, Jr., Note, *The Price of PICS: The Privatization of Internet Censorship*, 43 N.Y.L. SCH. L. REV. 523, 533-34 (1999) (distinguishing between evaluative “standards based” ratings systems and descriptive “rule based” ratings systems). Of course, ratings-based filtering *can* be evaluative; the MPAA system for movies has built into its ratings a suggested age (e.g. “PG-13”). The difference between ratings-based filtering and publication restrictions is the *ability* to implement a descriptive system. Publication restrictions are by their very nature evaluative because they restrict access to a certain class of viewers—therefore by necessity including within them a determination of what class to exclude—whereas ratings can be either evaluative or descriptive.

58. Of course, other methods of filtering, such as blacklisting and whitelisting, offer even more choice for parents by focusing on particular content, allowing very specific determination of what content is appropriate for a particular child. *See supra* note 50.

vary more than those about how much mature content is appropriate for children of a particular age. Deciding what content is appropriate for one's child hits on practically every moral issue at play in any society. Because every child is different, and every parent's values regarding content are different, we should endeavor to give parents the power to answer those questions instead of deciding for them by restricting access on the basis of age.

Age-based publication restrictions are vehicles for divisiveness in another way: they address several contentious issues with a single answer. It is important to remember that a content-regulation regime can represent many different values at the same time. All content-regulation regimes answer at least one value-laden question affirmatively: whether it is reasonable to impose *any* restrictions on the Internet in order to protect children. Publication restrictions, by defining blanket levels of restriction and access, necessarily lump that already divisive conclusion with another, even more contentious problem: deciding how much mature content children should be allowed to view. The decision to restrict children's access to mature content is controversial enough without designing a system that, by its very nature, also contains the value judgments about *what* content is appropriate for children of a given age.

Even if we were going to decide on a single criterion by which to determine if particular content can be viewed by a particular person, we should rely on a criterion better than age. There is no reason to believe that widely recognized and easily identifiable characteristics such as age are anything more than the roughest of proxies for what content is appropriate for a particular child. We don't adopt age-based rules because they are accurate, we adopt them because they are easy to administer. Society propagates age-based restrictions because age is a fact that is relatively easy for us to communicate to each other in a verifiable way. But not only are rough proxies like age poor indicators of maturity, Internet publication restrictions do not benefit from the bright lines they create. By avoiding bright-line rules, filtering has a second efficiency-based advantage over publication restrictions: its emphasis on the *viewer's* computer and the consequent ability to accurately ascertain information about the viewer.

One paradox about the Internet is that, while it makes it easier to obtain a huge amount of information, it actually

makes it much harder to obtain certain types of information. In particular, obtaining information about those who want to view a particular piece of content is much harder on the Internet than it is in the physical world. The relative difficulty of determining someone else's age on the Internet is evidenced by the measures determined to be "reasonable" attempts to prevent minors from accessing mature content. Under both the CDA and the COPA, for example, requiring a credit card to access covered content is a defense to liability.<sup>59</sup> But there is no reason why a minor can't get hold of a credit card.<sup>60</sup> If one is really trying to determine whether someone sitting several thousand miles away is over eighteen, it would probably be more effective to ask them questions about the Reagan administration. How many 17-year-olds know that Alexander Haig was Secretary of State?

Professor Lawrence Lessig points out in his article on *Reading the Constitution in Cyberspace*<sup>61</sup> that a major challenge raised by the Internet is its ability to defeat certain regulatory regimes that work in the physical world, pointing to the control of access to mature content as a specific example. Children are prevented from accessing pornography in the

---

59. Communications Decency Act § 502(2)(e)(5)(B); Child Online Protection Act § 1403.

60. See *Reno v. ACLU*, 521 U.S. 844, 857 (1997) ("Even if credit card verification or adult password verification were implemented, the Government presented no testimony as to how such systems could ensure that the user of the password or credit card is in fact over 18.") (quoting Finding No. 107 in the district court opinion in the same case, *ACLU v. Reno*, 929 F. Supp. 824, 847 (E.D. Pa. 1996)); 521 U.S. at 882 ("[T]he Government failed to adduce any evidence that these verification techniques actually preclude minors from posing as adults."). Credit card-based age authentication regimes also dispense with another aspect of Internet use that some find to be very valuable: anonymity. There is good reason to believe that those who want to view mature content on the Internet will hesitate when asked to provide a piece of information as personal and important as their credit card number. See *Reno v. ACLU*, 521 U.S. at 857 n.23 ("There is evidence suggesting that adult users, particularly casual Web browsers, would be discouraged from retrieving information that required use of a credit card or password.") (quoting *ACLU v. Reno*, 929 F. Supp. at 847). While there may be good reasons to eliminate anonymity on the Internet, it would be best if the decision to dump anonymity were made on the merits of anonymity itself, instead of as an unplanned side-effect of one method for limiting access to mature content. See also Letter from Lawrence Lessig to Hon. John McCain (Oct. 10, 1998), reprinted in 144 CONG. REC. S12,798 (1998) ("[T]he requirement . . . that adult [sic] turn credit [card] numbers over to pornographers in order to get access to constitutionally protected speech struck me as too great a burden.").

61. 45 EMORY L.J. 869, 885-86 (1996).

physical world by having to purchase it in a store. If a child tries to buy pornography in the physical world, the clerk in the store can see that the person trying to buy pornography is a child and refuse to sell it. But because the Internet hides our physical characteristics, it defeats this method of keeping kids from pornography. Professor Lessig relies on this difference between physical and virtual worlds to argue that greater regulation on the Internet may be appropriate in order to maintain the same level of “zoning” that exists in the physical world.<sup>62</sup>

And it is Professor Lessig who has offered a solution, or rather two different solutions, to this problem. The first is universal identification—probably in the form of digital certificates—that will verify the age of the holder of the certificate.<sup>63</sup> But if the certificates are portable from computer to computer, their efficacy could easily be defeated by one 18-year-old lending his certificate to 100 of his closest 15-year-old friends (perhaps for the low price of \$5 apiece). The reason why drivers’ licenses make such good identification is because they contain a picture of the holder of the license, making use by borrowers difficult.

It is possible to prevent borrowing of digital certificates. Their use can be tracked, making it easier to punish those who lend them out to minors, or they can be bound to a particular computer—for instance by tying them to a particular Internet address.<sup>64</sup> The first method of preventing borrowing, creating an ID system that allows misuse to be tracked to an individual, eliminates the possibility of anonymity, a quality whose merits

---

62. *Id.* at 885-87.

63. See Lessig, *What Things Regulate Speech*, *supra* note 20, at 649-51; see also Lawrence Lessig & Paul Resnick, *Zoning Speech on the Internet: A Legal and Technical Model*, 98 MICH. L. REV. 395, 406 (1999).

64. See Lessig & Resnick, *supra* note 63, at 407. Tying adult IDs to a particular computer by tying them to a particular Internet address is actually more difficult than it may sound. Many who connect to the Internet do so through telephone calls to their Internet service provider (ISP). In such cases, it is most common that the ISP will allocate an Internet address *for a particular session*. That way the ISP can reserve fewer Internet addresses than it has subscribers and reuse them when subscribers hang-up. See TECHENCYCLOPEDIA, at <http://www.computerwords.com/> (last visited Sept. 1, 2000) (defining BOOTP and RARP). If so, then the ISP would be a necessary participant under a regime in which adult IDs are tied to an Internet address, translating the permanent ID stored on the user’s computer into the temporary Internet address assigned for the particular session. See Lessig & Resnick, *supra* note 63, at 408.

warrant consideration in their own right.<sup>65</sup> Tying an adult ID to a particular computer seems much less troublesome, but is still imperfect for other, more practical reasons.

Regimes that tie regulation to a particular computer necessarily permit less mobility by users than regimes that regulate at the content provider's server. Thus, one advantage of most publication-restriction regimes is that they work equally well without regard to which computer is being used to access the content; they are tied to individuals instead of to machines. Filtering regimes, which also tie the regulation to a particular computer by requiring that the filter be activated on that computer, restrict mobility, but they do so only for those on whom are placed content access restrictions—specifically children. Reduced mobility is not as significant a burden to children because society has some interest in supervising their access to the Internet anyway, but the impact of reducing the ability of adults to access the content they want from *where* they want is not so slight. Internet cafés, for example, would disappear. Unless we are willing to impose substantial restrictions on how adults access Internet content in order to protect children, digital certificates for adults are a less-than-ideal substitute for real-world age identification measures.

Professor Lessig's second solution, developed in concert with others, addresses the problem of restricting adults' mobility, and seems to me a workable solution to the user-identification problem as it affects publication restrictions. In a modification of his "adult ID" proposal,<sup>66</sup> he has proposed using "kid IDs," "digital certificates that would be bound to a user's browser, but that would simply identify the user as a minor."<sup>67</sup> An even simpler implementation of this idea is to incorporate into Internet software a switch that turns on generic kid

---

65. See *supra* note 60. If the registration that allows tracking relies on support from the federal government (specifically the Commerce Department, see Lessig, *What Things Regulate Speech*, *supra* note 20, at 651), it will call for millions (perhaps billions?) of U.S. and foreign nationals to register with the U.S. government to obtain digital access certificates. Despite Professor Lessig's—and especially despite the government's—claims to the contrary, I think it likely that the public will mistrust a system that requires them to give, at any stage of the process, to the United States government information about themselves that can potentially be tied to their access of mature Internet content.

66. Professor Lessig has since concluded that an adult ID regime would be unconstitutional. LESSIG, CODE, *supra* note 19, at 176-77.

67. Letter from Lawrence Lessig to Hon. John McCain, *supra* note 60 (crediting Professor Mark Lemley for the suggestion).



identification without transmitting any specific information about the child using the computer.<sup>68</sup> Providers of adult content could then check whether the viewer has identified himself or herself as a “kid” and refuse to display mature content to those that do. Under this plan it is the children, not the adults who are tied to particular machines, much as they would be under any successful filtering regime. Children who are able to access computers that do not have the “kid” switch activated, or do not have filters activated, could get to mature content. Adults, meanwhile, because their access is not regulated in any way, are free to use any computer they wish.

The adult ID and kid ID plans demonstrate the problem with most publication-restriction regimes. Most of the publication-restriction regimes proposed have focused on the content provider as the gatekeeper between children and mature content. But it is at the point where physical and virtual worlds meet—at the computer where the child is sitting while browsing Internet content—that information about the content consumer is the easiest and least expensive to obtain. Why should we place on someone who could be thousands of miles away the burden of determining the content viewer’s age when we could place that burden on the person who controls access to the computer? The advantage under either of Professor Lessig’s plans, assuming that the IDs are tied to a particular machine, is that the party who controls access to that computer is the one who has to identify the age of the user. Between the two, kid IDs are a better solution than adult IDs because there is less harm from tying a child to a particular computer (or a limited number of computers, all of which are configured for that child’s access) than there is from similarly restricting the mobility of adults. Filtering, like the kid ID regime, shifts access control to the person who controls the computer, because it is that person who either sets the filtering criteria or the kid ID switch.<sup>69</sup> A regime that relies on content

---

68. Lessig & Resnick, *supra* note 63, at 416-17; Lawrence Lessig, *G-Rated Browsers*, THE INDUSTRY STANDARD, Dec. 13, 1999, at 48 (referring to this method as “kids-mode browsing”); Lessig, *What Cyberlaw Might Teach*, *supra* note 54, at 517-19 (same); LESSIG, CODE, *supra* note 19, at 176. Indeed, the superiority of kids-mode browsers renders the earlier adult ID proposal unconstitutional. See LESSIG, CODE, *supra* note 19, at 176.

69. Of course, some children will be able to bypass the filters—or the “kid” setting—installed on a particular computer. Avoidance is a problem with every content-regulation regime. Publication restrictions, in addition to the problems mentioned above, by virtue of the distance between the party

providers to bar access to mature content, without relying on the person who controls the computer through which the content is viewed, requires not only a poor proxy for determining the maturity of the viewer, such as age, it also requires an inefficient method for determining that proxy's value.

## 2. The Effect of Content Regulation on the Structure of the Internet

While filtering is superior to publication restrictions on both choice-maximization and effectiveness grounds, economic efficiency is not the strongest argument for choosing filtering over publication restrictions. The most compelling reason for rejecting publication restrictions in favor of filtering stems from the way that content regulation will alter the structure of the Internet.

That the choice of regulation will affect the structure of the Internet is not subject to much controversy. That widely accepted point is responsible for the great deal of scholarship and opinion being generated about Internet regulation.<sup>70</sup> The question touches on the many different areas of Internet regulation, from taxation to bandwidth pricing. But my point—except perhaps indirectly—is not one about how regulation will affect the Internet's efficiency as a medium of communications and commerce; it is, for lack of a better term, a point about the “meaning” of the Internet. As we choose how we are going to regulate content on the Internet, we need to consider how that regulation is going to affect what the word “Internet” means.<sup>71</sup>

---

enforcing the content regulation and the child, provide greater opportunity for thwarting the restriction. For instance, there are now sites on the Web that provide passwords that can be used to get past adult-access restrictions on adult sites. See Mike Stuckey, *Password sites: free thrill or a ploy?*, at <http://www.msnbc.com/news/283612.asp> (last visited Aug. 31, 2000). See also the Usenet newsgroup, [alt.sex.commercial-sites.password-exchange](http://alt.sex.commercial-sites.password-exchange), at <http://www.usenet.com> (last visited Aug. 31, 2000) (accessible under the “Find Your Favorite Newsgroup” search engine), which offers passwords to mature Internet content. Of course, it would be impossible to create an Internet site disclosing the password to defeat the filtering software on a particular computer because each computer would have its own password that protects access to the filtering controls.

70. See, e.g., LESSIG, CODE, *supra* note 19; Lessig, *What Things Regulate Speech*, *supra* note 20; Lessig & Resnick, *supra* note 63; Weinberg, *supra* note 33; Wu, *Application-Centered Internet Analysis*, *supra* note 28.

71. On how regulatory regimes can alter our perception of the object of the regulation, see generally Kenneth G. Dau-Schmidt, *An Economic Analysis of*

Regulation by publication restriction affects what can be published throughout the Internet. Filtering, by contrast, allows free publication on the Internet with the onus placed on content consumers to avoid content they find offensive by configuring their Internet software accordingly. If we prefer a regime that favors free publication, then the meaning that filtering carries with it—that there is certain content on the Internet that viewers may want to avoid—is preferable to the meaning conveyed by publication restrictions—that publication of mature content is such a bad thing as to subject one to legal sanction. The existence of publication restrictions emphasizes to speakers everywhere that they must exercise caution when expressing themselves, a message that society should be careful about conveying. In addition, by associating mature content with potential sanction, publication restrictions include within them a value judgment about mature content (for both adults and children); they “hard-code” disapproval of mature content into the regime.

It is sometimes necessary to live with imbedded messages of societal disapproval in content regulations in order to serve a competing interest such as protecting children from mature content. But the merits of the message as an end in itself—the value of condemning mature content as a social evil for both children and adults—is an issue separate from the wisdom of protecting children from mature content. Publication restrictions give the anti-mature-content contingent an advantage in the larger debate over mature content by allowing them to piggy-back their message on the condemnation that is a side-effect of regulation designed to protect children. That side-effect, and the unequal impact it has on the greater mature-content debate, should be avoided if possible. The Internet, by making available methods unavailable in physical space to screen children from mature content,<sup>72</sup> makes it possible to separate the two debates about mature content, and we should take advantage of that opportunity.<sup>73</sup>

---

*the Criminal Law as Preference-Shaping Policy*, 1990 DUKE L.J. 1, and Nigel Walker & Michael Argyle, *Does the Law Affect Moral Judgments?*, 4 BRIT. J. CRIMINOLOGY 570 (1964). My point is a slightly different one than those made by Walker, Argyle, Schmidt, and the recent scholarship on the social meaning of punishments. My point is not that regulation of mature content on the Internet will alter how society views mature content, but rather that it will alter how society views the Internet.

72. Lessig, *What Things Regulate Speech*, *supra* note 20, at 637.

73. In addition to conveying disapproval for mature content, the current

Publication restrictions, at least in their current proposed forms, would also convey society's disfavor for mature content by increasing the transaction cost of consuming mature content relative to the transaction cost of consuming non-mature content. If one is required to jump through a series of hoops<sup>74</sup> in order to access mature content, but not to access non-mature content, non-mature content will benefit at the cost of mature content.

More important than the effect our chosen content-regulation regime has on how we perceive the place of certain *content* on the Internet is the way that the regime will affect how we perceive the Internet itself. Any regulation of content on the Internet will effectively split the Internet into different parts. The choice of regulation will control how those parts are split and consequently how we perceive them. And how we perceive the different parts of the Internet will in large part determine how the Internet is used and how much value we get from it.

Publication restrictions force the Internet to split into "mature" and "non-mature" parts. In some parts of the Internet, mature content will be permitted, in others it will not. There are many ways to describe a particular site on the Internet, but if we rely on publication restrictions, every Internet site will have to include in its description whether it is in the "mature" or "non-mature" part, with a result something like having everyone add a new line to their street address indicating whether or not R-rated videos are present at that address. But do we want the first question we ask ourselves when accessing the Internet to be whether to go to the "mature" part of it? Shouldn't society create a system that focuses on much more interesting questions about the Internet's

---

Internet publication restriction regimes would require content consumers to make affirmative statements about their preference for mature content in order to obtain access to it. Instead of altering their browsers' filtering criteria (a decision made and implemented in private), consumers would be required to convey personal information to the purveyors of mature content. Under the most popular example of a modified publication restriction, they would have to provide information as personal as their names and credit card numbers. Again, anonymity may or may not be a positive aspect of the Internet, but our decision to limit it should be made on anonymity's merits, not on the necessity to eliminate it in order to implement unrelated regulation. *See supra* note 60.

74. Some of these hoops, such as using credit cards as a form of adult identification, may require the consumer to spend money on top of having to take the time to convey this private information.

organization than whether or not a particular part of it contains nudity, sex, or violence?

It is not initially obvious why filtering allows us to alter this threshold question about the Internet. All filtering does is enable consumption restrictions—to the consumer, there is no difference between filtering and publication restrictions because under either method overly mature content is simply non-existent for them.<sup>75</sup> Filtering combined with mandatory rating has an effect identical to that of multi-tiered publication restrictions—that is, publication restrictions with multiple levels of restrictiveness based on the content's maturity. Both publication restrictions and filtering accompanied by mandatory rating emphasize the importance of content maturity as an organizing principle for the Internet. Consequently, in order to prevent the parts of the Internet from being defined solely by whether mature content is allowed, any ratings-based filtering regime must be a voluntary one.

#### D. THE IMPORTANCE OF VOLUNTARINESS

A voluntary rating regime is one under which content providers are not required to rate<sup>76</sup> in order to publish and is concerned only with *mis*-rating; failure to rate is not a violation of the regime. A voluntary regime splits the Internet into two parts: a “regulated” part (consisting of sites on the Internet that have chosen to rate their content) and an “unregulated” part (consisting of sites on the Internet without ratings), instead of splitting the Internet into “mature” and “non-mature” parts. Under a voluntary regime, new Internet content will be unrated as a default—since rating will not be a prerequisite to creating content—and will therefore fall into the unregulated part of the Internet. Only by choosing to rate will content providers move their content into the more tightly controlled “regulated” part.

---

75. In a sense, the “contents” of the Internet are perfectly relative to each consumer, with every consumer provided a “different” Internet by virtue of technical or rule-based constraints. It is irrelevant to me as a consumer whether certain content doesn't exist on the Internet or I simply can't access it—for *me* it doesn't exist.

76. I have previously concluded that any system of content evaluation must be one in which the content provider is himself responsible for the evaluation. Every method of filtering except content-examination software requires some form of “rating,” so I refer to the evaluation of content by the content provider as “self-rating.”

The Internet's structure provides content providers with endless possibilities for developing new ways to organize and structure communications. But the creativity fostered by the Internet's structure would be endangered by a regime of mandatory Internet content regulation. Mandatory Internet content regulation will impede the development of both new content and new forms of content, both by increasing the cost of developing new forms of Internet communication and content and by forcing every creator of Internet communications to order its Internet communication method around filtering mature content.

#### 1. Regulation and the Internet's Culture of Creativity

The Internet has a few characteristics that separate it from other means of communication. One obvious aspect of the Internet is its power to allow people to organize themselves along whatever lines they choose. Within the limits of language, Internet users can decide to create communities that ignore traditional organizing principles like geography or ethnicity and instead rely on new organizing principles, such as choice of hobby or political interest. In this way the Internet allows us to exercise unprecedented control over both the participants to, and the subjects of, our communication. But it is not only the ability to easily discuss particular subject matter with someone half a world away that gives the Internet its character.

Like many powerful things, the Internet is very difficult to regulate; it is so by design. A child of the Department of Defense, the Internet was designed during the Cold War as a computer network capable, in part, of withstanding nuclear attack.<sup>77</sup> The result is a network that does not rely on any particular computer, or network "node," for its function; it is designed as a network of peers, each with the independent ability to communicate with the other nodes on the network. But without control vested in a single node, it is impossible to perpetuate enforceable rules to the other nodes. There is a set of rules governing how the nodes communicate, but they are contained in the design of the network as a whole; they are not dictated by whomever happens to be in control of a particular

---

77. KATIE HAFNER & MATTHEW LYON, *WHERE WIZARDS STAY UP LATE: THE ORIGINS OF THE INTERNET* 52-56 (1998). On the distributed nature of the Internet's design as discussed in this paragraph, see *id.* at 56-67, 113.

computer. Because the system was designed to favor the existence of communications and not the control of them, the ability to impose rules on other nodes was not emphasized.

This technical design has in large part driven the cultural development of the Internet by giving content providers the power to create new forms of communication while denying to others the power to squelch new forms of communication. One aspect of the Internet's flexibility is that it's hard to stop anyone else on the Internet from speaking.<sup>78</sup> If someone says something you don't like on the Internet, revoking their Internet "license" is not a practical option.<sup>79</sup>

But it is the Internet's ability to support new communication methods at practically no additional cost that is truly remarkable.<sup>80</sup> The Internet is a network that provides communication services, but the contents of those communications (within certain technical limits) are irrelevant to the network itself.<sup>81</sup> The Internet doesn't have to look like anything; it simply moves information between applications that determine what information should flow between content provider and content consumer and how that information should be presented.<sup>82</sup> At the same time, those things to which the Internet provides communications services, computers, allow us to use data in completely new ways. Thus, a message

---

78. Thus the well-worn quote from John Gilmore that "[t]he Net treats censorship as damage and routes around it." No one, including Gilmore, seems to know *when* he first said it, but that makes it no less powerful an assertion. John Gilmore, *John Gilmore, Entrepreneur*, at <http://www.toad.com/gnu/index.html> (last visited Aug. 31, 2000) ("I have never found where I first said this. But everyone believes it was me, as do I.").

79. That's not to say that people don't try. Many have, and often in the name of free speech, prevented others from using the Internet. One popular method is Web page hacking, in which one content provider takes over another content provider's Web site and alters the site's contents. For a collection of hacked pages, see *Hacked Sites Presented by www.2600.com*, at [http://www.2600.com/hacked\\_pages/](http://www.2600.com/hacked_pages/) (last visited Aug. 31, 2000). One other method of regulating the conduct of others is to flood their system with e-mail messages, bringing the miscreant's Internet gateway to a halt. This type of self-help took place in 1994 in response to the first widely disseminated commercial junk e-mail campaign on the Internet. CLIFFORD STOLL, *SILICON SNAKE OIL* 104-05 (1995).

80. The primary additional cost for supporting a new communication method on the Internet is for the additional network capacity needed for transmitting the increased traffic created by demand for the new method. There may also be some cost for software to run on both content consumer and content provider computers that supports the new method.

81. See *supra* note 1.

82. Wu, *Application-Centered Internet Analysis*, *supra* note 28, at 1163-64.

carried over the Internet from one computer to another can contain practically anything. It can contain an e-mail message, or a picture, or it can contain information used by the computer to structure other information.

Thus, it is not only what we think of as “content” that the Internet reduces the cost of transmitting, it is also the structure within which that content exists. Users can control not only the literal meaning of what they are saying to each other, they can control the way they say it. The Internet not only allows people to carry on a dialog, it allows them to redefine what it means to have a dialog. For instance, the Internet allows for both “newsgroups,” which provide for asynchronous messages, and chat rooms, which are real-time postings of messages that behave much like a conversation.

The form of the communication chosen on the Internet may have as much to do with its value as the content of the messages themselves. There is reason to suspect, for example, that the interaction to be found in a newsgroup is less emotional and more considered (and contains fewer spelling errors) than that in chat rooms because the response does not have to be as immediate. There are countless other ways to organize communication on the Internet.<sup>83</sup> The reason why the ways are “countless” is, because the Internet incorporates end-to-end network design,<sup>84</sup> there is nothing preventing someone from creating a new one.<sup>85</sup> By virtue of end-to-end network design, it is unnecessary to make the “Internet,” as a communications device, aware of what form of communications it is carrying. The message itself contains the information

---

83. There are, for instance, one-to-one e-mail, one-to-many e-mail, or even the World Wide Web, which provides very rich content but primarily provides information in one direction, from publisher to consumer.

84. See *supra* note 1.

85. The World Wide Web, for instance, is not a necessary part of the Internet. It was created decades after the Internet by using a language (Hypertext Mark-up Language, or HTML) already in use in other, non-networked, applications by using the Hypertext Transfer Protocol (HTTP) to transfer structured HTML communications from one computer to another. See NAUGHTON, A BRIEF HISTORY OF THE FUTURE, *supra* note 2, at 237-39; TIM BERNERS-LEE ET AL., WEAVING THE WEB: THE ORIGINAL DESIGN AND ULTIMATE DESTINY OF THE WORLD WIDE WEB BY ITS INVENTOR 36-37 (1999). The Internet simply transfers the HTML, using HTTP to control the transfer, from one computer to another, with Web-server software on the content provider's computer determining which content to send, and Web-browsing software on the content consumer's computer using the information carried by the Internet to format and display the content contained in those messages. NAUGHTON, A BRIEF HISTORY OF THE FUTURE, *supra* note 2, at 238-39.



needed for the receiving computer to figure out what to do with it.

This flexibility has allowed new forms of communication to develop without the sanction of any single entity. No one asked permission to propagate HTML and Web browsers, someone just came up with the idea, and demand for this new form of communication took care of the rest.<sup>86</sup> In a sense, the Internet is not only a marketplace of ideas, it is also a marketplace of *how to convey* ideas.<sup>87</sup>

The creation of “alt” is a wonderful example of how the Internet prevents some from imposing their own structure on others. A very popular form of communication on the Internet has been Usenet.<sup>88</sup> Originally, Usenet operated on a communications protocol, UUCP, that mandated reliance on a few backbone servers for the communication of messages. Newsgroups are organized by category—for example, the

---

86. On the process through which the Internet community standardized a particular language and addressing scheme for the World Wide Web, see BERNERS-LEE ET AL., *supra* note 85, at 54-66 (describing how Tim Berners-Lee combined a three-month vacation with a whistle-stop tour to get others to use a single standard for Web content).

87. That is not to say that there are *no* centralized authorities necessary for the existence of the Internet. The Internet is based on the Internet protocol (IP) for providing communications between computers. Internet Assigned Names Authority, *IP Address Services*, at <http://www.iana.org/ipaddress/ip-addresses.htm> (last visited Aug. 31, 2000). IP functions by means of numerical IP “addresses,” each of which is a “32-bit number often expressed as four octets in ‘dotted decimal’ notation.” *Id.* The IP address for the Smithsonian Institution’s primary Internet server, for example, is 160.111.2.1. If more than one entity starts handing out IP addresses on the Internet, there would be no way to tell which computer on the network should receive the message. The same problem, of course, exists for domain names, such as microsoft.com, which are also treated like addresses. The organization that currently has the responsibility of handing out both IP addresses and top-level domain names is the Internet Assigned Names Authority, but they will soon be handing both tasks over to the newly formed Internet Corporation for Assigned Names and Numbers. See Neil Randall, *The Name Game: Internet Corporation for Assigned Names and Numbers; Industry Trend or Event*, PC MAGAZINE, Nov. 2, 1999, at 247-48.

88. Usenet is a method of communication that organizes content into “newsgroups.” Newsgroups don’t necessarily contain “news” as that term is commonly used; they can contain any kind of content. Newsgroups are just a way of organizing content that allows users to associate their messages as responses to previous messages. If you read an interesting message in a Usenet newsgroup, you can post a response that is logically linked to the original message and future readers can view your response. The facts contained in this paragraph come primarily from Lee S. Bumgardner, *The Great Renaming 1985-1988*, at <http://www.vrx.net/usenet/history/rename.html> (last visited Aug. 30, 2000).

category `comp.lang.c++` contains discussions about the computer language C++. Because the entire Usenet relied on the services of a few backbone computers to propagate the newsgroup messages, the system administrators of those servers exercised considerable control over the categories available for discussion by simply refusing to propagate messages in categories they disfavored. In an effort to bring some order to the Usenet, the group of system administrators for the backbone computers, or the “Backbone Cabal,” decided in 1986 to propagate newsgroup discussions as they fit into only seven top-level headings that related roughly to different major topic areas—`comp`, `misc`, `news`, `rec`, `sci`, `soc`, and `talk`—effectively reshaping all Usenet messages to fit into those categories. The assignment of a discussion to a particular category was a decision with import because certain system administrators would propagate to other servers only messages for certain categories.<sup>89</sup> It took only two savvy Usenet participants to thwart the plan; Brian Reid and John Gilmore decided to host, on their own computers, an alternative set of newsgroups under the top-level category “`alt`” that did not use the backbone links. “The Great Renaming,” as the effort to create seven fixed top-level categories has come to be called, was thwarted when every group that could not find a home in the seven major top-level categories instead found a home in `alt`, which now carries everything from `alt.gambling`, which features discussions to about how to scratch the itch to gamble, to `alt.recovery.addiction.gambling`, which features discussions about how to recover from one’s addiction to gambling. When the Usenet was moved to the Internet, which allows for messages to be routed through practically any computer on the network, the ability of a few “backbone” system administrators to control the content of even the mainstream Usenet discussions evaporated. The Great Renaming, or rather its failure, provides a valuable lesson in how open to innovation non-exclusive networks like the Internet are; even though a

---

89. One major consequence of this aspect of Usenet communication was the “`comp.women`” debate. There was demand for a newsgroup that would discuss issues relevant to women. But placing that newsgroup in the “`soc`” category, where a social discussion would normally go, would mean that it would have limited distribution; some system administrators refused to transmit “`soc`” messages because they were deemed less relevant than the more important “`comp`” newsgroups. Eventually someone created the “`comp.society.women`” newsgroup, and the entire debate became moot as Usenet developed.

group of seeming authorities had made a design decision about how to organize information, they had little power to prevent others from organizing that information in the manner most useful to content providers and consumers alike, and when the Usenet moved to the Internet, they lost any power to do so at all. The Internet provides competition not only in the marketplace of ideas, but, more importantly, in the marketplace of methods for organizing ideas.

If we think that the culture of creativity that is fostered by the Internet's lack of structure is a good thing, then we should adopt a content-regulation regime that preserves that lack of structure. Splitting the Internet into "mature" and "non-mature" parts will focus all providers' and users' attention on the maturity of content as the threshold question in every decision about where to go on the Internet. It will also transform the whole Internet from what is now a relatively unregulated (at least in terms of content regulation) forum for content and ideas about how to organize content into a "regulated" sector in which every participant must either keep its communications behind closed "adult access" doors or maintain constant vigilance over its content. Doing so would keep all of us from engaging in the free-spirited experimentation that has made the Internet what it is today.<sup>90</sup>

## 2. The Impact of Mandatory Regulation on the Development of New Structures and Content

But not all of the arguments against a mandatory regime focus on what it will do to the "spirit" of the Internet. The cost of content regulation varies by the form of the content being regulated. Regulating content on World Wide Web pages that are (relatively) stable and subject to alteration by a single content provider may be feasible, while content regulation in the free-flow of e-mail, newsgroups, or chat rooms may be next to impossible; these latter areas are often valued specifically for their lack of regulation,<sup>91</sup> regulation for maturity being only

---

90. It may be possible to create seemingly un-regulated places on the Internet by creating places of wide appeal behind adult identification barriers, but the necessity of using an adult identification mechanism to obtain access will be a constant reminder that there is nowhere on the Internet where we can escape regulation.

91. Professor Lessig argues, rightly I think, that chat rooms and other "public spaces" on the Internet should be considered not "regulable." Lessig, *What Things Regulate Speech*, *supra* note 20, at 651-52; *see also* Wu, *Application-Centered Internet Analysis*, *supra* note 28, at 1169 (arguing that

one form of regulation eschewed by many Internet communities.

Another problem with mandatory regimes is that segregating mature from non-mature content is not necessarily an optimal way of organizing information on the Internet. This is not the same as saying that it destroys the “unregulated spirit” of the Internet, rather it is to say that other organizational schemes may be economically *superior* to the maturity method of organizing information on the Internet, and those alternative methods may never arise if organizing content by maturity is a mandatory overlay on all other content-organization methods.

If the regime is a mandatory one, it will require anyone who wants to create a new system of Internet communication to build in to that system the ability to lock-out unidentified users, increasing the cost of developing new ways to structure Internet content. That may not be much of a burden for a communication system as formalized as the Web, but if a new chat room system or newsgroup system were developed, it would be a major burden on the casual communications that often happen in such places. Faced with such a burden, and if not provided an alternative that allowed unguarded expression, users would avoid the new method. Placing extra burdens on new forms of Internet communication is not the way to foster their creation. Many new forms of Internet communication start out as grass-roots systems designed to allow a few friends to communicate in a new way.<sup>92</sup> If one’s target audience is only a few people and the likelihood of compensation for creating the new method is remote, then the extra cost necessitated by the need to include a way to keep mature content out of the hands of children will keep many new communications methods from being developed at all.

But under a voluntary regime, a new communication method need not include a mechanism for excluding children. If a new structure for Internet content becomes popular enough in the unregulated part of the Internet, then, and only then, will the Internet market for communications methods incite

---

the different applications supported by the Internet call for different levels of external regulation).

92. The Internet itself was originally designed to provide communications between only four sites, with eventual growth to nineteen. HAFNER & LYON, *supra* note 77, at 77-78.

providers to respond with the ability to rate and filter content within the new structure.

And what is true for ways of structuring Internet content is true for content itself. Mandatory regimes, such as publication restrictions and mandatory rating, require every content provider to go to the expense of evaluating their content, dramatically increasing the cost of creating new content. Often, new content will provide a reward to its providers insufficient to offset the added cost of rating it. A Web page intended for a small group that shares a common interest, or for those who cannot afford to compensate the provider, may never be created if, in addition to the cost of assembling and organizing the content, the creator must also examine the content for maturity.<sup>93</sup>

Dividing the Internet along the lines of regulation instead of along the lines of maturity will foster a self-reflective attitude about speech regulation and help to maintain our vigilant attitude toward speech regulation in any form. Asking the question, "Do I want to go to the regulated or unregulated part of the Internet?" serves as an automatic reminder that speech regulation is taking place, and will help us keep that regulation within its proper bounds. The question "Do I want to go to the mature or non-mature part of the Internet?" doesn't convey the same meaning—it causes us to focus on the type of content we are looking for and fails to confront us with the fact that we only have that choice at the price of speech regulation.

The Internet is about not only the inexpensive exchange of information, but also about inventing new ways to sort and

---

93. There are two ways in which the cost of rating such content may be prohibitive. One way is that the economic value of the information is small, either because it appeals to a small number of people, or because those to whom it appeals are unwilling or unable to provide the necessary incentive for the content provider to rate it. The other could be that even though the information is of some value to a large number of people, the price of rating it is extremely high. An example would be a library that is able to make the content of others available over the Internet. Under a mandatory regime, the library would have to examine each piece of content before including it in the online catalog for fear of making mature content available to all, a prohibitively expensive undertaking. Despite the cliché that you can't judge a book by its cover, you can get some idea about a book by its cover; under a voluntary regime, the library could examine select works that were, on their face, particularly appropriate for children and rate those before making them available. Similarly, the library could choose to undertake the cost for works considered to be unusually popular—and thus warranting the extra cost of rating in order to make them more widely available—while still making available unrated versions of all of their available content.

structure information. Splitting the Internet into mature and non-mature parts is simply one way of structuring information. That type of structuring is of great value to some members of society (those who have children or are sensitive to mature content), but it is of very little value to many others. Voluntary rating, however, allows other structuring methods to continue to compete against the mature/non-mature structure on equal footing. Mandatory systems do not, because no content provider would have the choice of forgoing the cost of organizing their content by maturity in favor of organizing it some other way. The impact of requiring all content providers to organize their content by its level of maturity will be felt not only in existing Internet communication methods, it will be felt as new methods are being conceived in the minds of the Internet pioneers to come.

Having established that the best regime for Internet content regulation is one of filtering based on voluntarily applied ratings, I move to the next question, a question that has sweeping ramifications for any content-regulation regime: *Whose* regime are we talking about?

### III. THE CHOICE OF A CONTENT REGULATOR

Intertwined with the question of *how* we should regulate access to mature Internet content is the question of *who* should regulate access to mature Internet content. The Internet has a decidedly libertarian, or even anarchist, bent, in part because of its design.<sup>94</sup> The lack of a hierarchical technical structure to the Internet<sup>95</sup> lends itself to a lack of hierarchical policy structure when it comes to its regulation. The Internet community agrees, without coercion, to follow certain technical and social standards.<sup>96</sup> Consequently, the government, an entity whose hold on the market for regulation in the physical

---

94. See Jay Kinney, *Anarcho-Emergentist-Republicans*, WIRED, Sept. 1995, at 90.

95. See *supra* text accompanying notes 77-78.

96. See generally Llewellyn Joseph Gibbons, *No Regulation, Government Regulation, or Self-Regulation: Social Enforcement or Social Contracting for Governance in Cyberspace*, 6 CORNELL J.L. & PUB. POL'Y 475, 487-89, 492-93 (1997) (describing the collection of organizations that effectively run the Internet and their lack of authority to do so). Although the players have changed somewhat since Gibbons's article in 1997, with the addition of the Internet Assigned Names Authority and the Internet Corporation for Assigned Names and Numbers and the decline of the InterNIC, see *supra* note 87, the process of Internet governance remains essentially the same.

world is a virtual monopoly, has faced a number of competitors in the market for Internet content regulation;<sup>97</sup> in an environment where many of the operating principles are de facto instead of de jure, formal regulation by a single body is far from given. What remains unclear is whether Americans are well-served by relinquishing the responsibility for Internet content regulation to non-governmental entities.

Not surprisingly, certain types of entities seem to be wed to certain types of Internet content regulation. Congress, much more comfortable with traditional forms of regulation (like publication restrictions) than new forms of regulation (like filtering), has limited its forays into Internet content regulation to publication restrictions, such as the now-defunct CDA and the currently under-fire COPA.<sup>98</sup> Only recently has Congress turned its eye to filtering, and even now most of the proposals deal with it indirectly, by encouraging the availability and use of filtering software without addressing how to filter.<sup>99</sup>

---

97. See *supra* Part I.B.2. (discussing filtering).

98. A district judge has granted an injunction against enforcement of the COPA, finding that it violates the First Amendment, and that decision was affirmed by the Third Circuit. See *ACLU v. Reno*, 31 F. Supp. 2d 473, 498 (E.D. Pa. 1999), *aff'd*, 217 F.3d 162 (3d Cir. 2000) [*ACLU v. Reno* (COPA)].

99. There have been many attempts, both as stand-alone bills and as proposed amendments to larger ones, to require schools and libraries to implement filtering and to require Internet service providers to make filtering software readily available to consumers. See, e.g., Neighborhood Children's Internet Protection Act, S. 1545, 106th Cong. (1999) (conditioning the universal telecommunications service provided for in the Telecommunications Act of 1996, 47 U.S.C. § 254(h)(1)(B), on the implementation of filtering or blocking software for Internet access); Amendment 1344 to the Consequences for Juvenile Offenders Act of 1999, H.R. 1501, 106th Cong., 145 CONG. REC. S9237 (same); Amendment 41 to the Consequences for Juvenile Offenders Act of 1999, H.R. 1501, 106th Cong., 145 CONG. REC. H4536-39 (same); Children's Internet Protection Act, H.R. 896, 106th Cong. (1999) (same); Children's Internet Protection Act, H.R. 543, 106th Cong. (1999) (same); Children's Internet Protection Act, S. 97, 106th Cong. (1999) (same); Safe Schools Internet Act, H.R. 368, 106th Cong. (1999) (same); H.R. 3177, 105th Cong. (1998) (same); S. 2260, 105th Cong. § 210 (1998) (same); S. 1619, 105th Cong. (1998) (same); Amendment 335 to the Violent and Repeat Juvenile Offenders Act of 1999, S. 254, 106th Cong., 145 CONG. REC. S5178 (1999) (adding § 402 to the Juvenile Offenders Act, which would have required Internet service providers to offer residential customers Internet filtering software for free or at their cost). An examination of the constitutionality of either kind of regulation is beyond the scope of this Article.

Only one piece of legislation has been introduced to date that actually proposes to establish a federal ratings system. See Media Violence Labeling Act of 1999, S. 1228, 106th Cong. That bill would have, after a time for submission of a "voluntary" proposal by industry, *id.* § 4A(a), have established

Proponents of filtering, on the other hand, have relied almost exclusively on non-governmental entities as sources of ratings vocabularies, filtering services, and filtering software.<sup>100</sup> The distinction is not without some sense; governments often regulate by means of prohibition, and private entities do not often have the power to restrict publication by others, so advocating and facilitating filtering is really their only option. Some private content-regulation systems incorporate publication restrictions, but those schemes depend on the content provider using the regulator's computer system as the place for publication. Thus, Prodigy can provide "moderated" chat rooms on its service,<sup>101</sup> but cannot expect to enforce publication restrictions on a computer system other than its own. The reasons are fairly simple. There is no *legal* way for a private entity to enforce publication restrictions except upon those with whom they have a contractual relationship, and there is no *practical* way, given the Internet's decentralized design, to control the content of others. The result is that almost all of the non-governmental and non-proprietary regimes have focused on filtering technology, with particular emphasis on the PICS method.

But very few in either the government or non-government camps have advocated active government involvement in filtering. Internet free speech advocates are anxious to keep government away from content regulation,<sup>102</sup> and Congress

---

a uniform age-based system for rating "interactive video game products and services, video program products, motion picture products, and sound recording products" but not, apparently, the Internet (except as one potential source of these other products), *see id.* § 4A(b). One year after passage of the bill, it would have been illegal to manufacture or sell any of these products without the rating affixed, *id.* § 4A(e), or to sell the product to someone under the age for which the product was rated, *id.* § 4A(f). The bill never made it out of committee.

100. *But see* Ari Staiman, Note, *Shielding Internet Users from Undesirable Content: The Advantages of a PICS Based Rating System*, 20 FORDHAM INT'L L.J. 866, 904-17 (1997) (advocating adoption of PICS-based filtering by the European Union and globally).

101. *See, e.g.,* Stratton Oakmont, Inc. v. Prodigy Servs. Co., 23 Media L. Rep. 1794, 1796 (Sup. Ct. N.Y. 1995).

102. There are exceptions. SafeSurf has proposed a set of principles that it thinks should be included in what it calls "The Online Cooperative Publishing Act," a law that would put the threat of government enforcement behind the use of private ratings. *The Online Cooperative Publishing Act*, at <http://www.safesurf.com/online.htm> (last visited Aug. 30, 2000). Under the SafeSurf proposal, publishing adult-oriented information without a rating attached is "negligent," but can be cured by affixing any PICS rating "that is issued by a



may have its own reasons for favoring even ineffective publication restrictions over a more cooperative approach centered on filtering.<sup>103</sup>

There is no reason why there must be this separation between types of regulators and types of regulation.<sup>104</sup> One of the major handicaps facing Congress's recent attempts to regulate mature Internet content, both politically and legally, is that they have been publication restrictions. Similarly, all of the proposed filtering regimes to date suffer from the defect that they attempt to regulate without use of America's most accomplished regulator: the United States government. Arguing that the government has no business in Internet content regulation originates, I think, in an incomplete picture of government's role as a regulator.

There are many considerations, which this part addresses in-turn, that make the federal government an ideal Internet content regulator. Content regulation is serious business, and so we should exercise as much care as possible to make sure the regulator we choose will not abuse its power. The government's experience as a regulator of speech has led to the development of tools for controlling how it does so. The nature of ratings—and ratings vocabularies in particular—as network goods reduces the value of relying on private entities to create them, because the cost of not having a single standard will be particularly high, and the benefits of having competition among many regulators will be particularly small. Further, the government, with its unique ability to both propagate and enforce a ratings regime, will be the best entity to provide a regime on which both content providers and consumers can rely. In doing so, the government's regime will actually confer power on content providers. But perhaps the best reason to

---

ratings service that has a minimum of 5,000 documented individuals using its system to mark their data." *Id.* On PICS-enabling statutes generally, see *infra* note 171.

103. See *infra* text accompanying note 185.

104. This characteristic of the discussion over content regulation has led some to merge two debates: the debate between filtering and publication restrictions and the debate between private and governmental content regulation. Thus Professor Lessig, in his article, *What Things Regulate Speech*, *supra* note 20, at 660-61, concludes that publication restrictions are superior to filtering regimes in part *because* filtering regimes empower private entities to filter content in negative ways. Although I disagree with Professor Lessig's conclusion that publication restrictions are superior to filtering, I adopt much of his reasoning because it supports the choice of governmental, as opposed to private, regulation.

choose the federal government as the Internet content regulator of choice is because of the positive effects government regulation will have on the ability of people around the world to speak freely on the Internet.

Before embarking on an analysis of a federal content-regulation regime using ratings, a brief discussion of the structure of such a system is appropriate. What I mean by a “federal ratings regime” is a two-part law. The first part of the law would simply create a ratings system by defining the meaning of certain tags and loosely defining how those tags should be applied to particular content.<sup>105</sup> This provision would define the government’s ratings vocabulary. The second part would be an enforcement provision, supplying the rules for handling violations of the ratings system defined in the first part.<sup>106</sup> Thus, the government would both define the ratings system to be applied under its regime and the set penalty for abusing that system.

#### A. THE PARADOXICAL VALUE OF THE GOVERNMENT’S INABILITY TO REGULATE INTERNET CONTENT

It is yet another paradox of Internet content regulation that the First Amendment’s hindrance of the federal government’s ability to regulate speech makes the federal government such a good candidate to regulate Internet content.<sup>107</sup> The wide variety of content available on the Internet is too important to be regulated by anyone else. The Internet’s power to convey practically any form of content to practically any part of the globe may reduce our reliance on

---

105. The mechanics of applying tags to different forms of Internet content, such as e-mail, newsgroup postings, or World Wide Web pages, could be the subject of regulations issued by an administrative agency.

106. In order to help deal with violators outside the reach of enforcement authorities, an ideal enforcement provision would include a method for requiring that Internet service providers stop carrying content found to be rated in violation of the system. See, e.g., Internet Gambling Prohibition Act of 1999, S. 692, 106th Cong. § 3(b)(4)(A)(i); Jack Goldsmith, *What Internet Gambling Legislation Teaches About Internet Regulation*, 32 INT’L LAW. 1115, 1119 & n.16 (1998) (citing Interstate Wire Act, 18 U.S.C. §§ 1081-84 (1994)) [hereinafter Goldsmith, *Internet Gambling Legislation*].

107. I am not the first to point out that the First Amendment’s restrictions argue in favor of government Internet content regulation over private regulation. See Shapiro, *The Danger of Private Cybercops*, *supra* note 11, at A31; Lessig, *What Things Regulate Speech*, *supra* note 20, at 655 n.73 (citing Shapiro, *The Danger of Private Cybercops*, *supra* note 11, at A31); LESSIG, CODE, *supra* note 19, at 173-82.

alternative sources of information to the point that we become dependent on the Internet for the widespread dissemination of all information.<sup>108</sup> As the Internet's importance increases, its attractiveness as a target for content regulators who wish to further a particular viewpoint will also increase. There is a reason why Jerry Falwell has not come out against indecency in Morse code radio broadcasts: Nobody listens to them. And as the Internet's importance increases, the power of private entities to obtain some measure of control over the consumption of Internet content will also increase because, as the Internet expands, we will rely less on publishers, such as newspapers, and more on information intermediaries,<sup>109</sup> such as ratings services, to order the overwhelming mass of content available on the Internet.<sup>110</sup> The First Amendment is powerful medicine against overreaching in the field of content regulation, but it applies only to regulation by the government.<sup>111</sup> If we instead rely on non-governmental entities to provide our Internet content regulation, we will be placing what could become the most powerful conduit for speech ever devised into the hands of regulators who are themselves free from any form of meaningful regulation.

Although the federal government's regulation of content, or more generally, its regulation of speech, has a far from spotless record, it is impossible to find a private organization whose record is any better. Even those organizations dedicated to free speech have been less than perfect; those who reject formal regulation have often been willing to take part in informal viewpoint regulation through the use of such devices as personal attacks,<sup>112</sup> and some free speech advocates have been more than willing to regulate how others speak through the

---

108. See *supra* note 9 and accompanying text.

109. Kathleen Sullivan, *First Amendment Intermediaries in the Age of Cyberspace*, 45 UCLA L. REV. 1653, 1654 (1998) (labeling similar entities between consumer and content "speech intermediaries").

110. Eugene Volokh, *Cheap Speech and What it Will Do*, 104 YALE L.J. 1805, 1817-18 (1995).

111. *Rendell-Baker v. Kohn*, 457 U.S. 830, 837-38 (1982); Eugene Volokh, *Freedom of Speech in Cyberspace from the Listener's Perspective: Private Speech Restrictions, Libel, State Action, Harassment, and Sex*, 1996 U. CHI. LEGAL F. 377, 407-08 [hereinafter Volokh, *Freedom of Speech in Cyberspace*].

112. See, e.g., James B. Speta, *Internet Theology*, 2 GREEN BAG 2D 227, 227 n.1 (1999) (reviewing MIKE GODWIN, *CYBER RIGHTS: DEFENDING FREE SPEECH IN THE DIGITAL AGE* (1998) and describing examples of *ad hominem* appearing in that book by Mike Godwin, counsel to the Electronic Frontier Foundation, an organization dedicated to free speech on the Internet).

Internet's equivalent of force, by using the Internet to access and alter the content of others or by attempting, through technical means, to deny others access to the Internet at all.<sup>113</sup> The simple fact is that when *people* are given the power to regulate speech, they cannot help regulating it in a way that favors their viewpoint. Although it is a phrase as unsophisticated as the third-grade social studies class in which we all first heard it, the "checks and balances" in the Constitution provide the best protection available against domination of the Internet by any particular regulator's viewpoint.<sup>114</sup>

The concern is not merely hypothetical. The potential for abuse—or what might be more charitably characterized as "unintentional attempts at censorship"—is already being realized. CYBERSitter, for example, has blocked their subscribers' access to sites critical or disruptive of the service<sup>115</sup> a regulation of the kind unseen in federal law since the Sedition Act.<sup>116</sup> Not all constitutionally problematic regulation is so blatantly antithetical to constitutional values. A perfect example of private regulation that would not pass constitutional muster is one of the most popular content-ratings systems on the World Wide Web: the previously mentioned RSACi system.

---

113. See *supra* note 79 and accompanying text.

114. But see Balkin, *supra* note 11, at 1169 (stating that entrusting ratings to federal regulators would result in the use of the ratings system to promote the differing political ideologies of successive administrations).

115. Weinberg, *supra* note 33, at 461-62; R. Polk Wagner, *Filters and the First Amendment*, 83 MINN. L. REV. 755, 763 n.20 (1999); see also Dobeus, *supra* note 31, at 633 n.43 (noting that Cyber Patrol also blocks content with which it does not agree); Evelyn Richards, *Dissident Prodigy Users Cut off from Network*, WASH. POST, Nov. 3, 1990, at C1 (reporting that the Prodigy network service denied access to users critical of Prodigy's pricing).

Indeed, the software filtering industry is rife with such abuses. During its installation routine, CYBERSitter scans the user's computer to determine if that user has visited Web sites critical of CYBERSitter; if it finds evidence that the user has visited such Web sites, it refuses to install. Brian McWilliams, *CYBERSitter Filters Out Privacy, Says Anticensorship Group*, PC WORLD NEWS RADIO (July 2, 1997), at <http://www.pcworld.com/cgi-bin/database/body.pl?ID=970702181157>. For a running list of abuses and questionable blocking decisions by filtering companies, see *Peacefire: Open Access for the Net Generation*, at <http://www.peacefire.org> (last visited Aug. 28, 2000).

116. The validity of the Sedition Act was never tested in the Supreme Court, but Congress refunded all fines paid under the Act, and President Thomas Jefferson pardoned all offenders convicted while the Act was in effect. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964).

The RSACi system uses a 4 x 5 matrix to rate Web content.<sup>117</sup> Content is rated in four categories: nudity, language, violence, and sex. Putting aside the question of whether “violence” is a constitutionally permissible category for content-based regulation,<sup>118</sup> the ratings *within* the categories are constitutionally worrisome, with at least one distinction between RSACi rating levels being explicitly, and recently, rejected by the Supreme Court as unconstitutional viewpoint regulation. In the “language” category, the difference between level 2 and level 3 is, in part, the presence of “hate speech.”<sup>119</sup> But the First Amendment prohibits the regulation of speech based on its classification as what the RSACi ratings label as hate speech. In *R.A.V. v. City of St. Paul*,<sup>120</sup> the Supreme Court held that a prohibition against speech similar to the RSACi definition of “hate speech”<sup>121</sup> is in fact viewpoint regulation and, as such, is prohibited by the First Amendment.<sup>122</sup>

---

117. See *supra* note 52 and accompanying text.

118. The Supreme Court has yet to address this question directly, but some courts have concluded that violence is not “obscene” as to children. *Cf. Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214 n.10 (1975) (“It is clear, however, that under any test of obscenity as to minors not all nudity would be proscribed. Rather, to be obscene ‘such expression must be, in some significant way, erotic.’”) (quoting *Cohen v. California*, 403 U.S. 15, 20 (1971)). At least one court of appeals has taken this language from *Erznoznik* and, despite the fact that it was obviously written with regard to nudity, applied it to invalidate a speech restriction on violent content. *Video Software Dealers Ass’n v. Webster*, 968 F.2d 684, 688 (8th Cir. 1992) (“Material that contains violence but not depictions or descriptions of sexual conduct cannot be obscene.”); see also *Eclipse Enter., Inc. v. Gulotta*, 134 F.3d 63, 67 (2d Cir. 1997) (refusing to decide whether violence can be regulated as “harmful to minors,” but concluding that “the standards that apply to obscenity are different from those that apply to violence”).

119. RSACi defines hate speech:

Any portrayal (words, speech, pictures, etc.) which strongly denigrates, defames, or otherwise devalues a person or group on the basis of race, ethnicity, religion, nationality, gender, sexual orientation, or disability is considered to be hate speech. Any use of an epithet is considered hate speech. Any description of one of these groups or group members that uses strong language, crude language, explicit sexual references, or obscene gestures is considered hate speech.

Internet Content Rating Association, *Definitions for RSACi Language Questions*, at <http://www.icra.org/language.html> (last visited Aug. 28, 2000).

120. 505 U.S. 377 (1992).

121. The ordinance found unconstitutional by the Supreme Court read:

Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the

Yet RSACi retains the distinction. If the RSACi were to become the standard for content regulation on the Internet,<sup>123</sup> then there would be an entire class of communications for which the Constitution's protections as a practical matter would not exist.<sup>124</sup>

Opinions may differ about whether a particular regulation is viewpoint-based or content-based.<sup>125</sup> But it is the difficulty of

---

basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

*Id.* at 380 (citing the Bias-Motivated Crime Ordinance, ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990)).

122. *Id.* at 391-92. In fact, the RSACi system is, from a constitutional standpoint, even less defensible than the ordinance found unconstitutional in *R.A.V.* The only speech punishable under the St. Paul law also qualified as "fighting words," a category of speech that is itself not constitutionally protected. *Id.* at 380-81; *see also* *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (holding that fighting words are not constitutionally protected). The RSACi system, on the other hand, would penalize (by assigning a rating that would lead to reduced viewership) speech that is otherwise completely within constitutional protections solely based on its status as "hate speech." A closer analogy is the Indianapolis ordinance at issue in *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 324 (7th Cir. 1985) (Easterbrook, J.), which prohibited the dissemination of material that, while not obscene and therefore subject to the normal First Amendment protections, included "the graphic sexually explicit subordination of women, whether in pictures or in words, that also" included some other special element of subjugation, such as depicting women as "sexual objects who enjoy pain or humiliation." *Id.* (quoting INDIANAPOLIS CODE § 16-3(q)). The Seventh Circuit concluded that the statute was viewpoint-based, and found it unconstitutional. *Hudnut*, 771 F.2d at 332-33, a decision summarily affirmed by the Supreme Court, 475 U.S. 1001 (1986).

123. In May of 1999, RSAC was folded into the new Internet Content Rating Association, which in turn promises to revise the RSACi ratings system to make it more attractive to parents worldwide. Pamela Mendels, *Internet Rating System Plans to Globalize*, N.Y. TIMES ON THE WEB (Sept. 25, 1999), <http://www.nytimes.com/library/tech/99/09/cyber/articles/25ratings.html>. One example given by Stephen Balkam, Executive Director of ICRA, is to adjust the system to account for the greater sensitivity to violence, and lesser sensitivity to nudity, felt by Europeans. *Id.* If the next-generation RSACi is indeed an international effort, it is likely to move even further away from following the standards for speech regulation set by the First Amendment.

124. The RSACi system also fails to account for the literary, artistic, political, or scientific value of content. Dobeus, *supra* note 31, at 643. This defect would make the application of the RSACi system to arguably "obscene" content unconstitutional. *See* *Miller v. California*, 413 U.S. 15, 24 (1973).

125. *Compare* the majority opinion in *R.A.V.*, 505 U.S. at 391-92, *with* Justice Stevens's concurrence in the judgment, *id.* at 435 (finding the regulation not to be viewpoint discrimination). *Cf.* *Board of Regents of the Univ. of Wis. v. Southworth*, 120 S. Ct. 1346, 1356 (2000) (holding that the viewpoint neutrality of a mandatory student activity fund saves it from a challenge alleging that students are being forced to fund speech with which they disagree).

drawing such conclusions about a particular form of speech regulation that makes non-governmental content regulation so dangerous. A good's characteristics determine, in large part, the need for regulation of the markets for that good; the harder it is for consumers to determine a good's true quality, the greater the need for regulation to prevent sellers from passing goods that differ in quality from the seller's description.<sup>126</sup> If so, then the market for speech (or Internet content) regulation—a market for a good of such complexity as to be the subject of lifetimes of study—calls for very strong regulation. It may be necessary for a private ratings service to keep its selection process secret in order to protect its property interest in the ratings information they create; at least one ratings service available today refuses to disclose its ratings databases in order to preserve its value as a trade secret.<sup>127</sup> At the same time, services use those secret criteria to make blocking decisions that are questionable at best.<sup>128</sup> The market for Internet content regulation requires strong regulation because it would be difficult for content consumers to detect the subversion of content regulation to the ends of the private content regulators.

The stakes in the contest to see who will set the standards for rating content on the Internet are high. The entire purpose of rating and filtering, to provide additional choice to content consumers, could be subverted if the market for ratings systems is a small one. Relying on a ratings vocabulary to filter content involves the delegation of choice to another entity: the entity that either designs the ratings vocabulary or applies that vocabulary to content.<sup>129</sup> If consumers choose a ratings system that has socially negative value, the cost in the form of lost socially beneficial content is potentially enormous.

---

126. See generally Michael R. Darby & Edi Karni, *Free Competition and the Optimal Amount of Fraud*, 16 J.L. & ECON. 67, 68-69 (1973) (discussing the "credence" qualities of goods, which are qualities whose benefits cannot be determined through normal use); Phillip Nelson, *Information and Consumer Behavior*, 78 J. POL. ECON. 311, 312 (1970) (discussing how limitations on consumer information about quality affect the structure of the market for consumer goods).

127. Lessig, *What Things Regulate Speech*, *supra* note 20, at 653-54.

128. CYBERSitter, for instance, has blocked the sites of both the National Organization for Women and the College of Humanities and Social Sciences at Carnegie Mellon University while keeping its blacklist secret. Andrew L. Shapiro, *Letter from Aspen: Blocking Software Triggers a Rocky Mountain High*, WIRED, Nov. 1997, at 118 [hereinafter Shapiro, *Letter from Aspen*].

129. See Balkin, *supra* note 11, at 1144-48.

Further problems arise from the fact that this choice must be made in a market with few providers,<sup>130</sup> who supply a good whose exact qualities that are hard for users to discover. These providers compete not on some readily ascertainable criteria like cost, but rather on who provides the “best” ratings system (using standards of quality that are largely subjective). As a consequence of this combination of factors, overreaching is likely. This is especially so in the area of ratings-based filtering because the impact of skewed ratings system—favoring certain kinds of content over others—may be difficult to detect because the consumer never sees the disfavored content; it is blocked out by the filtering software.

The market for speech regulation should be of even greater concern than markets for similarly complex goods because the best method of informal market regulation, speech<sup>131</sup>—and when it comes to information about the Internet, most of that speech will take place on the Internet itself—is itself the subject of the regulation. The inability of speech to respond to regulations that squelch speech may be why courts so often apply the First Amendment’s restrictions with an absolutist fervor rarely lent to other constitutional protections.<sup>132</sup> It is in the area of speech (including speech on the Internet) that regulation of the regulators is so essential.

The First Amendment is just such a regulation, and if the Internet turns to non-governmental regulation as the solution to the problem of protecting children from mature content, the First Amendment will be completely inapplicable.<sup>133</sup> To the contrary, if content regulation becomes a private enterprise, private ratings systems themselves will likely be considered protected speech and consequently subject to practically no governmental regulation at all.<sup>134</sup> The end result would be a

---

130. For an explanation of why there will be few content regulators even if there is competition for content-regulation regimes, see *infra* text accompanying notes 135-196.

131. *Cf.* *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 764-65 (1976) (discussing the importance of speech in the functioning of commercial markets); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269-270 (1964) (discussing the importance of speech in the functioning of democratic government).

132. *Compare, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377, 391-96 (1992) (striking down an ordinance prohibiting hate speech), *with Neder v. United States*, 527 U.S. 1, 12-13 (1999) (holding that the right to trial by jury is subject to harmless-error analysis).

133. *See supra* text accompanying note 111.

134. *Cf. Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of*



world in which the regulators would themselves be not only unregulated but unregulable.

The freedom of non-governmental entities to propagate regulations affecting the flow of speech without themselves being subject to regulation makes them dangerous candidates as providers of Internet content regulation. Given the value, and power, of the Internet's promise to provide inexpensive communication throughout the world, we should trust its regulation only to the entity that we trust the least to regulate: the government.

#### B. THE LOW VALUE OF COMPETITION IN THE MARKET FOR INTERNET CONTENT REGULATION

One advantage of placing Internet content regulation in the hands of non-governmental entities would be to allow competition among regulatory regimes, with all of the benefits that competition usually brings to markets. But the benefits of having competition in the market for speech regulation are likely to be few. Conversely, the price of creating a market for speech regulation is likely to be high, in part because content-ratings systems exhibit strong network effects. The prediction that it will be difficult to establish widely used Internet content ratings is simply a mirror of history; the technology to enable ratings-based filtering, PICS, and a viable ratings system, RSACi, have been available on the World Wide Web for over three years,<sup>135</sup> but still only a very small percentage of Web pages have bothered to rate.<sup>136</sup>

Several forces are driving the Internet toward a single content-ratings vocabulary. The nature of ratings vocabularies make them prototypical network goods; the demand for a

---

Boston, Inc., 515 U.S. 557, 578-81 (1995) (holding decision to exclude a group from a parade protected); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (holding a newspaper's decision not to print certain content protected); see also Volokh, *Freedom of Speech in Cyberspace*, *supra* note 111, at 386-87 (discussing how editing choices are constitutionally protected).

135. *RSAC/ICRA Timeline*, *supra* note 29 (announcing the launch of RSACi in a Feb. 28, 1996 Press Release).

136. According to Stephen C. Balkam, the Executive Director of the Internet Content Rating Association, the new entity in control of RSACi as of September of 1999, 120,000 Web sites had rated themselves using RSACi. Mendels, *supra* note 123. But the Web has approximately 10 million sites, Leslie Walker, *Wheat.com vs. Chaff.com*, WASH. POST, Oct. 28, 1999, at E1, which means that RSACi ratings have, even by its creator's own estimates, been applied to only 1.2% of the Web's sites.

particular ratings vocabulary by one group of users increases the utility of that vocabulary for other Internet users. Meanwhile, it will take time for the market for ratings vocabularies to reach equilibrium, and during that time, society will lose out on the benefits that a (perhaps less perfect) government vocabulary would have generated by its use. Furthermore, competition is unlikely to have many of its salutary effects in the market for ratings vocabularies, making regulation by government even more attractive as an option.

### 1. Ratings Vocabularies and Network Effects

A good exhibits network effects if “the utility that a user derives from consumption of [that] good increases with the number of other agents consuming the good.”<sup>137</sup> The definition is not limited to identical goods. A good can exhibit network effects if it is *compatible* with other goods.<sup>138</sup> Thus my collection of compact disc audio recordings is more valuable to me if there are people around me who own compact disc players because I will be able to play my CDs on their equipment. But the value of a network good can only be realized if it is built to a standard shared by other goods of the same type. For example, different makers of two-way radio sets must agree on a standard set of frequencies if buyers of those sets are to realize the full potential of sets from different makers. If radio makers do not follow a single standard and instead choose their own frequencies, then owners of sets made by different makers will not be able to communicate with each other; their network will not be the owners of two-way radio sets but rather will be limited to the owners of *a certain brand* of two-way radio set. Standardization allows unrelated entities to enter the market for network goods, bringing the benefits of competition to the market for that good.

Mark Lemley and David McGowan distinguish between three types of network goods:

---

137. Michael L. Katz & Carl Shapiro, *Network Externalities, Competition and Compatibility*, 75 AM. ECON. REV. 424, 424 (1985), *quoted in* Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CALIF. L. REV. 479, 483 (1998).

138. Lemley & McGowan, *supra* note 137, at 483 (citing Joseph Farrell & Garth Saloner, *Standardization, Compatibility, and Innovation*, 16 RAND J. ECON. 70, 70 (1985)).

Following Katz and Shapiro<sup>139</sup> we view network markets as falling on a continuum that may roughly be divided into actual networks, virtual networks, and simple positive feedback phenomena. The essential criterion for locating a good along this continuum is the degree to which the good provides inherent value to a consumer apart from any network characteristics. The greater the inherent value of the good relative to any value added by additional customers, the less significant the network effect.<sup>140</sup>

Individual content ratings<sup>141</sup> are network goods in only the loosest sense; they are, in Lemley and McGowan's words, "simple positive feedback phenomena," more commonly known as "economies of scale."<sup>142</sup> Although the only value of a content rating is its ability to communicate information, giving it no inherent value, an increase in *demand* for the content rating does not increase its value to those who are already using the rating. And it is the benefit consumers receive from increased demand by others that separates network goods from non-network goods.<sup>143</sup> An increase in demand is beneficial to those who want to view the rating, but only by reducing the rating's cost to them. Because the marginal cost of providing the rating to additional users is very close to nothing, every additional user of the rating lowers the cost for the other users by

---

139. See Katz & Shapiro, *supra* note 137, at 424.

140. See Lemley & McGowan, *supra* note 137, at 488.

141. All content regulations rely on content ratings of some kind. Some uses of ratings are explicit, such as in the case of the PICS standard, which uses ratings associated with specific content to determine whether to display the content. In the case of PICS, the network effect is clearest, because unless the consumer's Internet viewing software has been programmed to read the particular rating that the content provider has attached to his content, the software will not understand the rating and the information will be lost. But filtering that relies on content-examination software, or for that matter even a publication restriction, also relies on some sort of ratings system. Any regime that seeks to restrict access to certain content must have a set of criteria for determining the content to which access is to be restricted. Thus the portion of the Communications Decency Act aimed at keeping certain content away from minors sought to apply the rating of "indecent or obscene"; only "indecent or obscene" content was subject to the CDA's restrictions. See Communications Decency Act of 1996, Pub. L. No. 104-104, § 502(1)(a)(B), 110 Stat. 133 (codified at 47 U.S.C. § 223(a)(B)). Unless both providers and consumers had identical definitions of "indecent or obscene," the CDA would fail its purpose.

142. Lemley & McGowan, *supra* note 137, at 494 (describing "Positive Feedback Effects": "Where production of goods involves both fixed and marginal costs, the average fixed costs will decline as demand for the good increases, and the fixed costs are spread over a larger number of units. This is a common economic phenomenon—economies of scale.").

143. *Id.* at 484 ("[N]etwork effects are demand-side rather than supply-side effects: the shape of the demand curve is affected by existing demand.").

spreading that cost over a larger user base, a prototypical economy of scale.

Content ratings *vocabularies* also exhibit economies of scale; as more content consumers look for ratings in a particular vocabulary, the average cost per consumer of ratings using that vocabulary will decline. That alone might be enough to push ratings vocabularies to standardize on a single one, but reducing the average cost of providing the rating is not the only network effect demonstrated by ratings vocabularies. Ratings vocabularies demonstrate more profound network effects than the ratings themselves because demand for ratings vocabularies has two sources: content consumers and content providers. Content providers exhibit demand for a particular ratings vocabulary by their desire to use that vocabulary to rate their content, but they only benefit from doing so if content consumers demand the vocabulary as a way for them to evaluate content. Conversely, content consumers who use a particular ratings vocabulary for filtering content get utility from doing so only if content providers demand the same vocabulary to describe their content.<sup>144</sup> A ratings vocabulary is, as the name implies, very much like a language. It only works if it is common to both speaker and listener.<sup>145</sup>

---

144. Ratings vocabularies may have some inherent value; each ratings vocabulary is imbued with value judgments. Some ratings vocabularies contain explicit value judgments about what content is appropriate viewing (such as the CyberNOT list, which is generated by the folks at Cyber Patrol by evaluating sites along criteria that they believe determine whether the site is appropriate for children, *see supra* note 21), but even those ratings systems that merely describe content contain implicit value judgments about what categories of speech are suspicious enough to be evaluated for possible screening. The fact that a particular vocabulary allows filtering for some types of speech and not others is a statement about the categories of speech the vocabulary's author thought less valuable, or more dangerous, than others. *See Balkin, Noveck, & Roosevelt, supra* note 12, § 3.1. A comparison of the RSACi ratings vocabulary with the SafeSurf ratings vocabulary demonstrates the diverging value judgments imbued in each vocabulary. RSACi allows for ratings based on nudity, language, violence, and sex. *About ICRA, supra* note 29. In contrast, SafeSurf separates heterosexual and homosexual themes into two different categories and contains additional rating categories, such as the glorification of drug use or gambling. Ray Soular & Wendy Simpson, *The SafeSurf Internet Rating Standard* (May 1995), at <http://www.safesurf.com/ssplan.htm>. A demonstration of the inherent value of a ratings system would be if an Internet user chose a particular ratings vocabulary because it mirrors their feelings about a particular category of speech even if less content were rated under that vocabulary than under another vocabulary that did not reflect their values as closely.

145. Under Lemley and McGowan's definition, ratings vocabularies are

Ratings vocabularies also demonstrate network effects in markets for compatible goods.<sup>146</sup> They do so in two ways: First, ratings vocabularies affect the market for Internet viewing software. Ratings are useless to content consumers unless the Internet software they use is capable of recognizing the rating and acting accordingly. The availability of software using a particular ratings vocabulary will increase the demand for ratings under that vocabulary and, vice versa, the popularity of a particular ratings vocabulary will increase demand for Internet software that allows filtering based on that vocabulary.<sup>147</sup> Second, ratings vocabularies will exhibit network effects vis-à-vis the market for new forms of Internet content, an effect that has broader implications for the structure of the Internet. This relationship is closely tied to the one just described between ratings vocabularies and Internet software because new forms of Internet content are often

---

“actual networks” because they demonstrate all the characteristics of communications markets. Lemley & McGowan, *supra* note 137, at 488-90.

Although Lemley and McGowan themselves maintain that languages are not normally examples of actual networks, they do so on the ground that it is impossible to exclude others from using a language. *Id.* at 489-91. But ratings vocabularies *do* allow their owners to exclude others from using them. Individual ratings are subject to intellectual property protection, and ratings services can exact concessions from content providers who want to use that intellectual property to describe their content. See *RSACi Terms and Conditions*, at <http://www.icra.org/terms.html> (last visited Aug. 28, 2000) (explaining that RSACi itself retains ownership of the RSACi rating assigned to particular Internet content and may revoke the content provider's license to use that property). Lemley and McGowan acknowledge the possibility of excluding users from using “more specialized languages.” Lemley & McGowan, *supra* note 137, at 490 & n.34.

Lemley and McGowan's “actual networks” and “virtual networks” are closely related to S.J. Liebowitz and Stephen Margolis's “literal networks” and “metaphorical networks.” S.J. Liebowitz & Stephen E. Margolis, *Network Externality: An Uncommon Tragedy*, 8 J. ECON. PERSP. 133, 135-36 (1994). Liebowitz and Margolis raise their own objection to considering languages as, in their parlance, literal networks. Their argument is that even if one could obtain property rights to a language, “an owner of a language would have great difficulty monitoring illicit use.” *Id.* at 136. But detecting unauthorized use of a ratings vocabulary on the Internet would be relatively easy. In order to obtain the benefit of its illicit use of the ratings vocabulary, the misbehaving content provider would have to post his rating on the Internet, where it would be available for all, including the author of the vocabulary, to see.

146. See *supra* text accompanying note 138.

147. The effect is identical to that between operating systems and application programs; the existence of software programs running on a particular operating system increases the demand for that operating system. Lemley & McGowan, *supra* note 137, at 491-92.

manifested by new Internet software applications. The World Wide Web, for instance, was not created in a vacuum; it is inextricably tied to Web browsers, without which the Web would be inaccessible. Just as support by Internet software creates demand for a particular ratings vocabulary, support by new forms of Internet content will also create demand for a particular ratings vocabulary. The converse, of course, is true. If support for a popular ratings vocabulary is included in a new form of Internet content, the popularity of that ratings vocabulary is likely to increase demand for that new form of content.

Further pushing the market for ratings vocabularies to a single standard is the high cost of maintaining multiple ones. Both content consumers and content providers must make an investment in whatever ratings vocabulary they choose, and each additional ratings system imposes costs on both content consumers and content providers.

Content consumers must evaluate each additional ratings system, and ratings systems do not lend themselves to inexpensive evaluation. A ratings system is a good with benefits that are extremely subjective because ratings systems are rife with value judgments about what makes some speech more “mature” than other speech. Information about the value judgments contained in a ratings system is both extremely complex and much more difficult to share than more objective information about, for instance, the price of a good.<sup>148</sup>

---

148. Although markets often deal quite well with complex goods, their ability to do so rests on the ability of the market to make information about the good less complex than the good itself; in the case of the stock market all of the complex publicly known information about a given company is contained in the very easy to understand metric “price.” See Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1431 (1989) (“[P]rices quickly and accurately reflect public information about firms.”). As the Supreme Court explained in *Basic, Inc. v. Levinson*,

[w]ith the presence of a market, the market is interposed between seller and buyer and, ideally, transmits information to the investor in the processed form of a market price. Thus the market is performing a substantial part of the valuation process performed by the investor in a face-to-face transaction. The market is acting as the unpaid agent of the investor, informing him that given all the information available to it, the value of the stock is worth the market price.

485 U.S. 224, 244 (1988) (quoting *In re LTV Sec. Litig.*, 88 F.R.D. 134, 143 (N.D. Tex. 1980)).

This is unlikely to happen in the world of speech regulation, in which values about the quality of speech regulation are less easy to express than values about the financial quality of a complex good. It is hard to envision a

In addition to the cost to content consumers of obtaining information about several ratings services, content providers face a high cost in *rating* their content under multiple systems. Each ratings system a content provider uses to rate his content will require its own separate rating process to be performed every time the content provider changes the content he is publishing. There is no reason to believe that the marginal cost of performing each additional rating process will be low; ratings systems may (and, in order to justify their existence, are likely to) vary widely.

Given the strong network effects (in the form of classic network effects and the network effects attributable to compatibility), and the large resource commitments required from both content providers and content consumers for each new ratings system, it is likely that the Internet will standardize on a few, or possibly even one, system for rating Internet content.<sup>149</sup> Absent ideological differences, it will be in the interest of content consumers, existing content providers, and providers of new forms of Internet content to focus their efforts on a single ratings vocabulary in order to maximize the utility they gain from rating their content.

## 2. The Net Effect on Social Welfare

From the standpoint of efficiency, the primary argument against introducing the government as an Internet regulator is that the government's ratings vocabulary will be somehow inferior to the one that would be developed as the result of competition among ratings services. Even if that were true, it is not at all clear that the reduction in the social benefit suffered from using the government's sub-optimal ratings vocabulary would not be outweighed by the increase in social benefit of having a standard vocabulary sooner than if we waited for competition to lead to an "optimal" one. As Mark Patterson writes,

to the extent that a seller could create sufficient early demand for its product to "tip" the market in its direction, some of [the] wasted investment [in standards that will not survive the competition

---

readily understandable and easy to communicate metric-like price to compare different kinds of speech regulation.

149. See Mark A. Lemley, *Antitrust and the Internet Standardization Problem*, 28 CONN. L. REV. 1041, 1045-52 (1996) (describing network effects, compatibility factors, and resource commitments and concluding that the combination of these three phenomena will usually drive Internet-related standards contests to a single dominant standard).

leading to a single standard] could be avoided. In that case, even if the product on which buyers settled were less satisfactory than another that they rejected, buyers might benefit from the simple fact of having, early in this process, collectively chosen one product, rather than continuing (as a group) to use a variety of them.<sup>150</sup>

Thus, the proper metric for evaluating the effects of government intervention in the market for ratings vocabularies is not the cost of reaching a sub-optimal result but rather that cost offset by the benefit of reaching a standard earlier than we would under a competitive model. In other words, the appropriate standard is the “*net* effect on social welfare.”<sup>151</sup>

Whether the benefit of early standardization outweighs the cost of inhibiting development of an optimal ratings vocabulary is an empirical question that is currently unanswerable. The market for rated content, much less the practically non-existent market for ratings vocabularies, is far too immature to meaningfully support any claims about the tradeoff between having a single standard and eventually reaching an optimal one through competition, but there are some inferences we can draw about the relative value of standardization versus competition. As an initial matter, there is the value of standardization. Because ratings vocabularies exhibit strong network effects, the value of standardization is unlikely to be inconsequential;<sup>152</sup> by definition, goods with strong network effects benefit more from standardization than normal goods. The next question has to be about the likely value of competition.

### 3. Competition's Limited Benefits in Developing an Optimal Ratings Vocabulary

There are many reasons to believe that competition will not bring with it many of its traditional benefits to the market for ratings vocabularies.

---

150. Mark R. Patterson, *Coercion, Deception, and Other Demand-Increasing Practices in Antitrust Law*, 66 ANTITRUST L.J. 1, 74-75 n.323 (1997).

151. Lemley & McGowan, *supra* note 137, at 506 (emphasis added).

152. Indeed, the absence of a widely used ratings system on the Internet today in the face of continual calls for some form of Internet content regulation is evidence of the problems being encountered in reaching a standard. See Wagner, *supra* note 115, at 769 (“[I]n late 1998, it seems unlikely that an idealized PICS system will spring up soon without at least some form of government intervention.”).



One normal benefit of competition over government standard-setting that is unlikely to have its full effect is the difference in the durability of competitively and governmentally created standards. One criticism of government standard setting is that it results in overly durable standards. Voters, whose decisions are often both far removed in time from, and made without regard to, any single government policy decision, provide a form of feedback much less direct than the ability of market participants to “vote with their feet.” As a result, government standards are more likely than market-determined standards to outlast their usefulness, hindering progress when they do.<sup>153</sup> But standards with strong network effects and calling for large resource commitments, like ratings vocabularies, often display the same characteristic, if perhaps to a lesser degree.<sup>154</sup> This characteristic of goods with strong network effects is similar to the effect at issue in the larger debate about whether the harms of government intervention in the market for ratings vocabularies are outweighed by the benefits of early standardization, but it occurs at the other end of the standard’s lifecycle. Just as the benefit of reaching a single standard quickly may outweigh the harm of never reaching an optimal standard, the benefit to market participants—who have invested in a particular standard—of maintaining the old standard will inhibit the market’s move to a new, superior one.<sup>155</sup> Thus it is unclear that a market-derived ratings vocabulary will really be that much easier to change than one created by government.

Further eroding the value of competition is the increased visibility, to both content consumers and content providers, of a single ratings system. Jonathan Weinberg describes the loss caused by having a single ratings system defined by the government as a “freeze [in] technological development by eliminating competing pressures leading to the introduction of

---

153. Lemley & McGowan, *supra* note 137, at 543.

154. See Lemley, *supra* note 149, at 1052.

155. See *id.* (“All three of these factors[, network effects, compatibility factors, and resource commitments,] point in a single direction—towards a small set of standardized products with market durability that may significantly outlast the competitive superiority of the product.”).

Professor Lemley concludes that the government should stay out of the standard-setting business because competitive pressures make privately set standards marginally more amenable to change than government ones. *Id.* at 1063. There is, however, a way to make government standards subject to competition: by making them voluntary. See *infra* note 199.

improvement in new searching, filtering, and organizing techniques.”<sup>156</sup> But Professor Weinberg’s concerns may be overstated. A single government ratings system may prove itself *easier* to modify than several systems existing under what would be imperfect competition. If there are several ratings services, it may be hard for both content consumers and content providers to obtain particularly good information about any one of them because efforts to obtain such information would need to be spread out over all of them, but the singular nature of the government-sponsored system would make it the focus of all investigation and discussion about ratings. The focus of all attention on a single ratings system would make it harder for that system to hide its failings, and if content consumers and providers have an accurate picture of the system’s attributes, they will be able to provide feedback to the single ratings service (in this case the government) more easily than they would if there were multiple ratings services.

Furthermore, a government ratings vocabulary is likely to be an open one; unlike private entities whose ratings are the source of some benefit to them,<sup>157</sup> the government has no interest in preventing others from using its ratings system. A government system is likely to be published to all, increasing the ability of others to compete in the market for products implementing the government’s ratings system, and consequently marginally increasing the social benefit to be reaped from implementing an Internet content-regulation regime.<sup>158</sup> The result is that, although government intervention may reduce competition for a standard ratings vocabulary, it may actually provide more benefit than an optimal standard reached through competition.<sup>159</sup>

Although it is impossible to reach an absolute conclusion about whether the benefit gained from reaching a single standard ratings vocabulary quickly would outweigh the harm

---

156. Weinberg, *supra* note 33, at 473.

157. At least one private ratings service available today refuses to disclose its ratings database in order to preserve its value as a trade secret. See Lessig, *What Things Regulate Speech*, *supra* note 20, at 653-54 & n.67.

158. That competition could be in the markets for both Internet filtering software and for products to help Internet content providers rate their content.

159. See Lemley & McGowan, *supra* note 137, at 541-42 (describing the benefits of government standard setting which can include the following: “a wasteful competition to set a de facto standard is avoided, and the government can presumably mandate open access to the technical interface, permitting competition within the standard”).

from choosing a sub-optimal vocabulary, all indications are that it would because of the strong network effects exhibited by ratings vocabularies. It is sufficient for present purposes, however, that the benefits of early standardization are not clearly outweighed by the reduction in quality of the ratings vocabulary that will eventually become the standard. Consequently, efficiency-based arguments against government intervention in the market for ratings vocabularies are not sufficiently strong to warrant exclusion of the government as author of Internet content regulation.

But perhaps the best reason for discounting the value of competition in the market for ratings vocabularies is that an *efficient* outcome may not be an optimal one. Competition's value is in achieving an efficient outcome, but efficiency is not the value our society has traditionally sought when considering the impact of speech regulations. The political equivalent of a free-market economy is majoritarianism—a market whose currency is votes—but we do not trust speech regulation to majoritarian, market-driven forces. Constitutional guarantees like the First Amendment are *anti*-majoritarian; they are specifically designed to thwart outcomes from which a majority of citizens would receive greater utility.<sup>160</sup> The Bill of Rights evinces a belief that, when it comes to some forms of regulation, we need to be protected from ourselves; unless we are prepared to discard the anti-majoritarian sentiment contained in the Bill of Rights, we should be wary of creating a market for speech regulation. Pure competition may result in a ratings vocabulary that provides the most content providers and content consumers with the greatest utility, but it may not result in an “optimal” one.

### C. CREDIBILITY, UNIFORMITY, AND REAL CHOICE

Another reason why the government is better-suited to content regulation than private entities is that no other entity can create as credible a regime of content regulation as the government. Without credible enforcement, any form of content regulation will fail both content consumers and content providers.<sup>161</sup>

---

160. See THE FEDERALIST NO.10 (James Madison); THE FEDERALIST NO. 51, at 323-24 (James Madison) (Clinton Rossiter ed., 1961).

161. The arguments in this section have their genesis in James Speta's *Internet Theology*, a review of Mike Godwin's *Cyber Rights*. See Speta, *supra* note 112.

“Self-regulation” is an unlikely candidate as the source of Internet content regulation. None of the ingredients for a self-regulatory regime exist on the Internet. The low cost of publishing content on the Internet makes the group of content providers enormous, implying a correspondingly enormous hurdle to solving the collective action problem facing any group that seeks to regulate itself. And the strong network effects exhibited by the Internet make the ability of individuals to exercise the ultimate self-regulatory choice, choosing to exit the Internet, not much of a choice at all; the choice of exit as a regulatory strategy “is illusory in a strong network market” such as the Internet.<sup>162</sup>

The fact is that content providers have a strong incentive to mis-rate their content. Why would a content provider try to get its content to someone who doesn’t want to see it? The answer, in short, is advertising;<sup>163</sup> providers of mature content, following a model that applies to all content providers, are always trying to grow their market by reaching a *new* audience, an audience that by definition has not yet seen the value of their mature content. And on the Internet, there is a particularly strong incentive to create opportunities for unintended viewing because advertising in this way is comparatively inexpensive. The added cost of casting a broad, as opposed to a narrow, net is small on the Internet because it is inexpensive to distribute the same content to additional consumers; the content provider does not have to send a separate mailing to each viewer, he just has to provide his site with adequate network connectivity (which is usually available at low marginal cost) to handle additional viewers. The low cost of transmitting sample Internet content may make it worthwhile for a content provider to expose a great number of unlikely consumers to his content in the hope that even 1 in 10,000 will decide to subscribe to the content provider’s service or in some other way compensate the content provider.

---

162. Lemley & McGowan, *supra* note 137, at 561.

163. Speta, *supra* note 112, at 232; *see also* ACLU v. Reno (COPA), 31 F. Supp. 2d 473, 476 (E.D. Pa. 1999), *aff’d*, 217 F.3d 162 (3d Cir. 2000) (“These Web sites offer ‘teasers,’ free sexually explicit images and animated graphic image files designed to entice a user to pay a fee to browse the whole site.”), *aff’d*, 217 F.3d 162 (3d Cir. 2000); Elizabeth M. Shea, Note, *The Children’s Internet Protection Act of 1999: Is Internet Filtering Software the Answer?*, 24 SETON HALL LEGIS. J. 167, 185 (1999) (collecting examples that demonstrate the ease of inadvertently discovering pornographic material on the Internet).

The sanctions for exposing unsuspecting consumers to mature content are also low. The lack of formal regulation leaves offended viewers with little legal recourse, and the low cost (and portability) of providing content makes it very difficult for consumers to seek recourse through informal means, such as by protest or boycott.<sup>164</sup> Some providers of mature content have taken advantage of the low cost and low risk of obtaining additional viewers by essentially tricking content consumers to visit their Web sites and, once there, attempting to prevent them from leaving the site by altering how their Web browsing software works.<sup>165</sup>

Under a self-regulatory regime with multiple ratings systems, consumers who rely on a particular ratings system face the additional burden of trying to figure out how the system has been abused and what recourse they may have. The relationship between content provider and ratings service is likely to be divorced from the relationship between consumer and ratings service. Under the RSACi regime, for instance, there is *no* relationship between consumer and the ratings service. Consumers do not form a contract with RSAC, they simply adjust the controls on their Internet software to filter out certain content. There is no reason to think content consumers would have any standing (except perhaps on some kind of false-advertising theory) to attack the misuse. Content consumers would also have no way of knowing, without reading the agreement between the ratings service and the content provider, whether the content provider had in fact violated the ratings service's policies.

One way to solve this problem is to have those who sponsor the ratings system being abused attempt to impose sanctions for abuse of their vocabulary. The ratings service is likely to have a strong incentive to make sure their ratings vocabulary is not being misused because constant mis-rating—regardless of who is ultimately responsible—will lead consumers to

---

164. See *supra* text accompanying notes 46-49.

165. See Stephen Labaton, *Net Sites Co-Opted by Pornographers*, N.Y. TIMES, Sept. 23, 1999, at A1; see also Stuckey, *supra* note 69. Mr. Stuckey describes how some sites on the Internet offer to divulge free passwords to other sites that contain mature content, thus destroying the revenue stream for the content provider and defeating one method of keeping unwanted viewers, including children, away from the content. *Id.* What Mr. Stuckey discovered, however, was that some providers of mature content were "divulging" passwords to their own sites as a way of attracting new viewers. *Id.*

dismiss the particular system as unreliable. But the ability of ratings services to impose legal sanctions will be limited for the same reason mentioned above: the low cost of providing content. The service will first have to find the content provider, and then the service will have to sue the provider, both costly propositions (if even possible given the ability to publish mis-rated content destined for the United States from anywhere in the world). The low cost of publication means that many of the abusers will have no real assets with which to compensate the ratings service for the misuse, leaving the ratings service with one expensively placed finger in the dyke and about five billion other potential mis-raters extant.

The availability of non-financial compensation to content providers provides another reason for governmental involvement. Because of the low cost of publication, many content providers are not seeking direct monetary benefit from providing content. Instead, many content providers publish content on the Internet because they get personal satisfaction from doing so, because they'd like to share their interests, or because they obtain benefits of status from publishing on the Internet. Abuse of the Internet as a method for violating the law without the expectation of financial benefit has led Congress to pass measures like the No Electronic Theft (NET) Act.<sup>166</sup> Prior to the NET Act, criminal liability under the Copyright Act was predicated on financial gain, but now the law criminalizes any willful infringement if the total retail value of the copyrighted works exceeds \$1,000.<sup>167</sup> The need for such a law was not previously recognized because copyright violators *had* to seek monetary compensation for their violations, else they had no way to pay for the costs of

---

166. Pub. L. No. 105-147, 111 Stat. 2678 (1997) (codified in scattered sections of 17 U.S.C., 18 U.S.C., and 28 U.S.C.).

167. 17 U.S.C. § 506(a)(2).

As is the case in the copyright laws, it would seem only appropriate to require willful mis-rating in order to impose criminal liability. The First Amendment prohibits the imposition of criminal liability in obscenity cases for any mental state less culpable than "scienter," *Smith v. California*, 361 U.S. 147, 153-54 (1959), although "scienter" means only that the defendant must have known of the nature of the content, not that it was legally obscene, *Hamling v. United States*, 418 U.S. 87, 123 (1974) ("It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials. To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law.").

duplication and distribution. With the Internet providing those services practically for free, the need has arisen for expanded criminal sanctions.

The same is true of mis-rating. Faced with low publication costs, many may choose to mis-rate without the hope of financial gain. Those who do not gain from their mis-rating may have little in the way of assets to satisfy harmed consumers or ratings services. Criminal sanctions have traditionally been the deterrence of the financially undeterrable; there is no reason to believe they are any less appropriate for wanton mis-rating, and, traditionally, only the government is permitted to impose such sanctions.<sup>168</sup>

Furthermore, it's not clear that ratings services could put themselves in a position to obtain credible sanctions even if they did not face jurisdictional burdens and judgement-proof defendants. Although the tort of misrepresentation provides ratings services with some recourse, they can only reduce their costs of enforcement (such as access to an appropriate forum or reducing the likelihood that the relationship will be subject to a governing law that provides no recourse) if they enter into contracts with those content providers who use the ratings service. But even if they do enter into agreements, they are unlikely to have the ability to insist on credible enforcement provisions because content providers as a class will have considerable market power in choosing a ratings service. Ratings system providers have two customers: the content consumer and the content provider. Demand from only content consumers would be like demand for a language only by listeners but not by speakers; the language would remain

---

168. Logically, it would be possible to impose criminal sanctions for mis-rating based on a private ratings vocabulary; one organization has already proposed it. *See supra* note 102. Thus, falsifying an RSACi rating could itself be a crime. But the First Amendment would likely prohibit statutes designed to enforce private ratings systems. The government has no legitimate interest in propagating or enforcing speech regulation that regulates categories of speech other than those permitted by the First Amendment. Thus, the First Amendment would prohibit a law against the mis-rating of anti-Christian content as pro-Christian because the government has no legitimate interest in helping its citizens screen out anti-Christian content. As Professor Lessig argues, "[t]he most that the First Amendment can permit . . . are regulations that facilitate discrimination in a narrowly drawn sphere." Lessig, *What Things Regulate Speech*, *supra* note 20, at 646. Professor Lessig's argument is about which *technology* the government has an interest in enabling, but I believe that the same argument applies to which *ratings vocabularies* the government has a legitimate interest in facilitating. *See also id.* at 665.

unused. Demand by content consumers will have some effect on the demand from content providers; that is what gives ratings vocabularies their status as network goods. But some element of demand will be based on the preferences of content providers alone. If ratings services rely on content providers to provide some portion of the total demand for their vocabulary, then they will not be able to insist on draconian enforcement provisions in their agreements with content providers. Given the choice between two equally popular ratings services, content providers will choose the one with the least-imposing enforcement provisions. Content providers will likely have both better information about the various ratings services than content consumers, and, relatively speaking, are more likely than content consumers to coordinate their efforts to influence the standard-setting process that leads to the selection of a standard ratings vocabulary. As such, they are likely to have a large impact on that process, and the result of a market-driven standard-setting process for ratings vocabularies is unlikely to result in a standard with which content providers are universally unhappy. That may account for the popularity of the RSACi system, which is not only sponsored by major content providers,<sup>169</sup> but also allows itself practically no recourse against those licensees of RSACi who misuse the ratings.<sup>170</sup> Consumers, meanwhile, are unlikely to have a thorough understanding of the relationship between content provider and ratings service (Do you completely understand your doctor's relationship to your HMO—a relationship in which you have considerably more at stake than in the relationship between your ratings service and your content provider?). Content consumers will not know—except

---

169. The RSACi system had early support from Microsoft, IBM, and CompuServe. See *RSAC/ICRA Timeline*, *supra* note 29.

170. The remedies that RSAC reserves for itself in the RSACi Terms and Conditions are quite weak. RSAC has the right to audit ratings, and if it finds that the content provider is misusing those ratings, "RSAC may, upon written notice and an opportunity for Applicant to defend before RSAC the basis for the Assigned Rating, take appropriate action, including but not limited to corrective labeling, consumer and press advisories and postings on appropriate Web Sites." *RSACi Terms and Conditions*, *supra* note 145. So RSAC's remedies are limited to corrective remedies, but such remedies provide very little deterrence to mis-rating; the mis-rater has nothing to lose but the rating, which he wouldn't have but for the mis-rating. *Id.* If, after that process, the rating is still inaccurate, RSACi may terminate its license to use the rating, which is defined as RSACi's trademark, thus finally giving itself a punitive remedy for trademark violation. *Id.*



perhaps by experience with unreliable ratings services—that the ratings service has no recourse against errant content providers. The result will be a “race to the bottom,” with only ratings services who give themselves little recourse being able to convince content providers to use their ratings vocabulary.

This dumbing-down effect is less likely under government regulation because of another difference between governmental and private regulation: uniformity. Government regulation is uniform regulation. Even under a voluntary regime—a regime that does not require rating but only punishes *mis*-rating—content providers would be provided with two choices: rate or don’t rate. The middle ground, rating under a private ratings service that has no enforcement power, would not exist. Given the choice between an enforceable rating and no rating at all, content providers are more likely to accept a ratings system with bite.

If uniformity lends itself to credibility, then we encounter yet another paradox of Internet regulation: uniformity breeds choice. For it is only if there is a credible method of rating content that anyone can truly choose to rate. A method of content rating without enforceability makes it impossible for those who want to make credible statements about the maturity of their content to make such statements because it will be impossible to demonstrate their belief in their own rating by putting themselves at hazard if the rating is wrong. Imposing liability for making misstatements has a long tradition as a tool for providing a way for those who want to make truthful statements to make credible ones. All of us as consumers and participants in markets rely on laws, from common law trademark to federal securities statutes, in deciding whether to regard a particular statement as credible. Without a credible sanction, those willing to assume liability for mis-rating will be denied the ability to do so.<sup>171</sup> And if no

---

171. See Speta, *supra* note 112, at 230 (stating that libel law can provide incentives for those wishing to make truthful statements that will be believed).

Another problem of relying on private regulation is highlighted by one of Professor Lessig’s concerns with regard to ratings-based filtering technology: that it may be used by third parties to prevent others from receiving certain content. See Lawrence Lessig, *Tyranny in the Infrastructure*, WIRED, July 1997, at 96; Lessig, *What Things Regulate Speech*, *supra* note 20, at 659-63. Professor Lessig’s concerns center on PICS, currently the most popular standard for tag-based ratings, and specifically the fact that PICS is designed to be “vertically neutral.” See Lessig, *supra* note 20, at 659 (“Blocking

one can make a credible rating, it will make it impossible for consumers who want to rely on ratings to control the flow of content to their computers.<sup>172</sup>

#### D. POWER-CONFERRING RULES

The Internet community has, because of its desire to keep the government out of Internet content regulation, so far been willing to forgo the availability of credible sanctions.<sup>173</sup> There have been few arguments in favor of government regulation of Internet content, and for good reason. The government's

---

software is bad enough—but in my view, PICS is the devil.”). That is, content tagged using the PICS standard can be filtered at any level of the distribution chain between content provider and content consumer. *Id.* Thus, countries, search engines, or Internet service providers can use PICS to filter out content that the content consumer may not want filtered, denying the content consumer the choice that rating is designed to confer. *Id.* at 659-61. PICS also provides the ability to store ratings separately from content, allowing third parties to apply their own PICS ratings to others' content. *See* World Wide Web Consortium, *Platform for Internet Content Selection*, at <http://www.w3.org/PICS/> (last visited Aug. 27, 2000). This is the method employed by the “Internet Filtering Solution,” a service offered by SafeSurf in 1996 and 1997 that relied on its own computers to filter content for subscribers based on ratings assigned by SafeSurf itself. *See SafeSurf Examined*, at <http://www.peacefire.org/censorware/SafeSurf/> (last visited Aug. 27, 2000). Regardless of its implementation, upstream filtering can take the choice of whether to view certain content away from the content viewer.

While concerns about third-party filtering are certainly justified, they are readily addressed by a *legal* rule prohibiting third parties from filtering content without the consent of content consumers. Thus, while ratings may make it technically possible for third parties to filter without consent of the content consumer, the legal regime may compensate for this technical aspect of ratings. The ability to compensate for undesirable aspects of a particular technology that is otherwise beneficial, like ratings, is one of the benefits of relying on a legal solution, like government-sponsored ratings, instead of a purely technical solution, like PICS.

172. It is not only producers of non-mature content that may benefit from credible content regulation. One author has suggested that any ratings system lends itself to the possibility of subversion. In order to appeal to certain demographics, content providers may actually *increase* the maturity of their content in order to achieve a higher rating. *See* John T. Delacourt, *The International Impact of Internet Regulation*, 38 HARV. INT'L L.J. 207, 227 (1997).

Delacourt touches upon a good point although perhaps not the one he intended. If the application of credible ratings results in a “race to the raciest,” that is, if providing more information about a certain product, in this case mature content, increases the demand for it, then our society must currently be underproducing mature content. Thus an additional efficiency-based justification for Internet content regulation is to increase the production of mature content to its optimal level.

173. *See, e.g.,* Barlow, *supra* note 4.

recent—and arguably ham-handed—attempts at Internet content regulation are hardly the kind of laws that engender trust by free-speech advocates.<sup>174</sup> But laws like the CDA and COPA are not the government's only choice. The CDA and COPA are both proscriptive laws; they seek to prevent users of the Internet from publishing content freely. Internet free-speech advocates have proposed, in response, voluntary systems of rating and filtering that would not limit how content could be published.

But the choices offered so far, between government-sponsored mandatory regulation and privately coordinated voluntary regulation, need not be the only ones. Why has the debate to this point married a particular regulator to a particular form of regulation? The reason, I think, is an impoverished view of what it means to “regulate.” “To regulate,” has several meanings. One definition is to “direct according to law,” but it also means “to reduce to order, method, or uniformity.”<sup>175</sup> While it is easy to point to examples of laws that “direct,” equally important are laws that “reduce to order, method, or uniformity.” A major goal of the Uniform Commercial Code, for instance, is not to outlaw certain contracting practices but to establish default rules around which parties are free to contract.<sup>176</sup> The implied warranty of merchantability, for instance, is not a mandate that sellers issue warranties; it is simply the default rule for sales contracts.<sup>177</sup> Article II goes further, providing a specific mechanism for disclaiming that warranty and therefore granting contracting parties the power to exclude it.<sup>178</sup>

Many laws, far from denying people power by proscribing conduct, grant power by providing the means for individuals to structure their relations in a legally binding way. H.L.A. Hart pointed out this difference, separating rules into two classes: rules that impose duties and rules that confer power.<sup>179</sup> So far, the federal government's proposals have all focused on its ability to promulgate rules that impose duties, but such laws are only half (albeit the more obvious half) of what government can do to bring regulation to the Internet. A regime of

---

174. *See generally* statutes cited *supra* note 7.

175. WEBSTER'S NEW INTERNATIONAL DICTIONARY 2099 (2d ed. 1946).

176. U.C.C. § 1-103 & cmt. 2 (1999).

177. *See* U.C.C. § 2-314 (1999).

178. U.C.C. § 2-316 (1999).

179. HART, *supra* note 6, at 33.

voluntary ratings is a law of the power-conferring sort. It confers upon content providers the power to make credible and binding statements about the content they provide on the Internet. As Hart pointed out, this potential of law—the ability of law to confer power—is “a feature of law obscured by representing all law as a matter of orders backed by threats.”<sup>180</sup> Perceiving law as limited to imposing duties backed by threats is a mistake that both sides of the Internet content-regulation debate have made.<sup>181</sup>

But all this is not to say that duties should not be imposed on those who choose to avail themselves of power-conferring rules by rating their content. A system of ratings without sanctions is, as this part argues, less than optimal because it provides no option for those who really want to take part in the system. Power-conferring rules are, as Hart called them, “recipes for imposing duties.”<sup>182</sup> It is only by creating duties, as opposed to aspirations, that such rules can have their desired effect of truly conferring power upon those who choose to subject themselves to them. “[I]t is important to realize that rules of the power-conferring sort, though different from rules which impose duties and so have some analogy to orders backed by threats, are always related to such rules . . . .”<sup>183</sup>

Government-defined voluntary ratings are different from “traditional” forms of Internet content regulation because they don’t seek to deprive anyone of power—in this case the power to publish on the Internet. In its rush to impose a duty on Internet content providers not to publish mature content to minors, Congress, along with society and the Internet community, has focused on its ability to impose duties on

---

180. *Id.* at 28.

181. Another approach is for government to use its spending power to encourage the use of ratings by conditioning expenditures on the use of filtering software. That is the idea behind the many proposals to condition universal service grants to libraries and schools on their use of filtering software. See sources cited *supra* note 99. The proposals to date, however, have focused on government encouraging the adoption of the *ability* to filter without attempting to influence the ratings system adopted. See, e.g., Paul Schiff Berman, *Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to Private Regulation*, 71 U. COLO. L. REV. 1263, 1264-65 (2000). Such an approach defeats many of the advantages of having government-promulgated Internet content regulation and actually increases the chances that sub-optimal private Internet content regulation will dominate the Internet landscape.

182. HART, *supra* note 6, at 33.

183. *Id.*

participants<sup>184</sup> without enough consideration of its ability to confer power on them.

Different players in the content-regulation debate may have different reasons for jumping to the regulation-as-threat model. Prohibitions are dramatic and easily understood responses to problems that grab the nation's attention, making them more valuable to legislators as a political tool for demonstrating their responsiveness to this recent problem than would be a more nuanced approach of power-conferring rules. To free-speech advocates, who are unlikely to cotton to any government involvement in Internet speech regulation, the specter of censorship that accompanies mandatory regimes provides an easier target than suggestions for voluntary regimes that retain government as a participant. Finally, the Internet establishment (the early users of the Internet) has a strong incentive to attack attempts by government to regulate the Internet not merely because they have rationally concluded that the Internet is ill-suited to regulation but because *any* outside regulation would upset their vision of the Internet.<sup>185</sup> Like those of free speech advocates, the interests of these individuals and entities are better served by government bans than by power-conferring rules because bans provide them an easier target than would power-conferring rules. Thus, no one currently involved in the debate has a strong incentive to propose governmentally sponsored power-conferring rules as a method of Internet content regulation. But the danger presented by the tenor of the debate as it is conducted today is that, in response to the government attempts at publication restrictions, we will be driven away from government as a regulator and choose instead to rely on private Internet content regulators; as explained in this part of the article, that choice has tremendous potential to result in regulation considerably more distasteful than anything the government has to offer.

One tenet apparently shared by, and motivating, all three camps is the perception that the power of legislatures to confer power on individuals is a weaker form of regulation than the power to proscribe. After all, who considers the U.C.C. to be as bold an assertion of the legislature's power as the criminal law? But because of the Internet's ability to carry information across

---

184. See *supra* note 7 and accompanying text.

185. See Timothy Wu, *When Law and the Internet First Met*, 3 GREEN BAG 2D 171, 172-74 (2000); see also Barlow, *supra* note 4.

borders—and because of the ways in which regulation can be built into information carried on the Internet<sup>186</sup>—Congress's power to confer power may actually be stronger than its power to impose duties on Internet content providers, particularly content providers who are not located in the United States. That possibility is examined immediately below and in the later part on Extraterritorial Application of Federal Ratings Laws.

#### E. EXPORTING THE FIRST AMENDMENT

The truly fascinating result of relying on the United States government to propagate a widely used ratings system—and the one that should put those who support the First Amendment squarely behind a federally created Internet content-ratings system—is the *international* impact of such a system. By providing a single, voluntary system for Internet content rating and filtering, the United States government would be in the position of promulgating its own de facto Internet standard.

Although limited in its ability to promulgate de jure regulation outside of the country, the United States still dominates the Internet in terms of both publication of content and access by consumers.<sup>187</sup> There is currently no national group of Internet users that outnumber Americans,<sup>188</sup> and America is by far the most attractive market for those providing Internet-related goods and services.<sup>189</sup> Foreign content providers hoping to reach those Americans who might be sensitive to mature content will have an incentive to apply the American content ratings to their own content.

The U.S. government, by resolving a collective action problem existing in the single largest market for Internet content—and consequently in the single largest market for

---

186. See LESSIG, CODE, *supra* note 19, at 6.

187. See Press Release, Computer Industry Almanac Inc., *U.S. Tops 100 Million Internet Users According to Computer Industry Almanac* (Nov. 4, 1999), <http://www.c-i-a.com/199911iu.htm> (estimating that the United States accounted for 43% of world-wide Internet users at year end 1999).

188. *Id.*

189. Not only does the United States have the largest group of Internet users, *id.*, they are spending a lot of money on the Internet, making it attractive to content providers the world over. See Angela Curry, *There's Direct Help For Gifts That Didn't Arrive On Time*, KAN. CITY STAR, Dec. 28, 1999, at E2 (noting the Direct Marketing Association prediction that Americans would spend \$11 billion on the Internet in 1999).

Internet content ratings—would go a long way toward resolving that same collective action problem for the entire world. The same large installed base of computers with the American content-ratings system that would give American content providers the incentive to rate their content would give foreign content providers a similar incentive to use the U.S. system. In this way, America would rely on market forces to *export* its content-regulation regime to other countries in exactly the way that America exports billions of dollars of U.S. currency every year to countries with economies too unstable to support their own currency.<sup>190</sup> The same economic strength that provides American currency the stability and value that draws citizens of other countries to use it also provides the incentive for citizens of other countries to publish Internet content using American content ratings.<sup>191</sup>

And in yet another paradox of Internet content regulation, one dictated by the protections of the First Amendment, exporting American content regulation would have the effect of exporting freedom. America's Internet content ratings would be imbued with the free speech values contained in the First Amendment because, as a creature of the state, the American content-regulation regime must pass First Amendment muster.<sup>192</sup> At the same time, its existence as a *de facto* standard for Internet content regulation would reduce the demand for other attempts to regulate. Imagine a nation concerned with controlling dissemination of two forms of content, one a permissible subject of speech regulation under the First Amendment, such as material that is harmful to

---

190. See Michael M. Phillips, *U.S. Officials Urge Cautious Approach To Dollarization by Foreign Countries*, WALL ST. J., Apr. 23, 1999, at A4.

191. Other countries have successfully exported content-regulation regimes, if not for the Internet. One example is the People's Republic of China. When Star TV, a trans-Asian satellite service began broadcasting, transmissions deemed offensive by the Chinese government, such as the BBC news, were inadvertently received in China as a consequence of Star TV's broadcast area, which spread from Turkey to Japan. When the Chinese government responded to the offensive inadvertent transmissions by banning satellite dishes, the satellite operator discontinued the offending broadcasts in one entire portion of its broadcast area, thus denying access to that content by people in countries outside China. Khan et al., *supra* note 21, at A1.

192. Thus Professor Lessig has argued that legislation to enable and enforce *private* ratings systems would be unconstitutional. Lessig, *What Things Regulate Speech*, *supra* note 20, at 665. Similarly, I think the United States is constitutionally prohibited from entering into any multinational attempt to set Internet content ratings unless those ratings would survive First Amendment review.

minors,<sup>193</sup> and one an impermissible subject of speech regulation under the First Amendment, such as speech critical of the nationally established church. If the U.S. regime were already in wide use, the incentive of that country to establish its own content control regime would be reduced; one of its desired objects of regulation, content that is harmful to minors, would already be regulated, so the marginal benefit of promulgating its own regime would be lower than if the U.S. system were not in place. Some countries interested in regulating Internet content in ways inconsistent with the First Amendment will choose not to regulate.<sup>194</sup> The United States, by establishing a *de facto* standard consistent with the *de jure* requirements of the First Amendment, could displace demand in other countries for other content-regulation regimes. The result would be the practical application of the First Amendment's protections outside of the United States. In this way, the United States, long criticized for exporting

---

193. By "harmful to minors," I merely mean that speech from which government has, consistent with the First Amendment, a legitimate interest in shielding children. See *infra* note 217.

194. Similarly, countries that wish to keep undesirable content from their population might do so by using the U.S. ratings to filter content "upstream." See Lessig, *What Things Regulate Speech*, *supra* note 20, at 659-63 (describing the ability to filter at any level of the distribution chain using ratings tags). While we would all prefer that such countries do no upstream filtering, if countries whose political environments lend themselves to filtering are going to filter, it is preferable that they do so on the basis of a U.S. ratings system that would result in greater freedom than many other forms of filtering. The only other form of filtering available to such countries and as effective as tag-based filtering, whitelisting, has such a high cost that its is likely to result in very little content for the citizens of such countries. Thus Professor Lessig's objection to filtering, that filtering makes it easier for others to regulate content, see *id.* at 641-43, needs to be tempered with the understanding that a regime that includes filtering only enables upstream filtering to the extent it is supported by the ratings vocabulary. Weinberg, *supra* note 33, at 467-69; see also Balkin, Noveck, & Roosevelt, *supra* note 12, § 3.1. An attempt to filter out only pro-choice content, for instance, won't work unless one is using a ratings vocabulary that distinguishes between pro-choice and pro-life content. If the dominant ratings vocabulary is based in the First Amendment, then others will only be able to perform upstream filtering along lines recognized as valid by the First Amendment. The real concern is that other countries will violate First Amendment values by altering the filters, for instance by denying *all* citizens access to speech that is harmful to minors, an impermissible result under the First Amendment. *Reno v. ACLU*, 521 U.S. 844, 875 (1997); *Butler v. Michigan*, 352 U.S. 380, 383 (1957). While that may happen, it is certainly preferable to the many other forms of content regulation those countries might choose in the absence of an easy-to-implement U.S. ratings system.



regulation<sup>195</sup> to other counties, would be the first nation to promulgate regulations on the Internet that effectively export freedom.<sup>196</sup>

My proposal for federal Internet content regulation—and especially my assertion that federal content regulation can promote more freedom of speech in other countries—leads to a number of obvious questions, not the least of which is whether it is constitutionally permissible for the federal government to propagate an Internet content-regulation regime. I address constitutional concerns next, but the key both to successful exportation of federal content regulation and to constitutional federal content regulation resides in a characteristic of efficient content regulation that I've already discussed: voluntariness.

#### IV. FURTHER IMPLICATIONS OF FEDERAL INTERNET CONTENT REGULATION

Relying on the federal government as the Internet's content regulator introduces some complications into the process of creating an appropriate content-regulation regime. For free speech advocates, however, they are complications happily addressed, for they are complications that would not trouble the private Internet content regulator at all. Fortunately, these complications are resolved by a regime that uses voluntarily applied ratings.

Before I analyze the importance of voluntariness, I should explain what a "*voluntary* federal rating regime" is.<sup>197</sup> In the

---

195. Perhaps the best example of U.S. attempts at extraterritorial regulation, and one that has created a great deal of backlash by the international community, is the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (codified in scattered sections of 22 U.S.C.), more commonly referred to as the Helms-Burton Act, which seeks to penalize foreign nationals in various ways for their participation in transactions in Cuba, and specifically providing a cause of action in U.S. courts against foreign nationals who "traffic" in property formerly owned by U.S. interests. *Id.* § 302; see Therese Raphael, *U.S. and Europe Clash Over Cuba*, WALL ST. J., Mar. 31, 1997, at A14.

196. Of course, as the nation most responsible for the creation of the Internet itself, the United States has already gone a long way toward furthering the cause of free speech throughout the world. See also LESSIG, CODE, *supra* note 19, at 167 ("We have exported to the world, through the architecture of the Internet, a First Amendment *in code* more extreme than our First Amendment *in law*.").

197. A regime of voluntary federal content rating is considered in Volokh, *Freedom of Speech in Cyberspace*, *supra* note 111, at 432-33.

example given above, a federal ratings statute,<sup>198</sup> I described two parts: a ratings vocabulary and an enforcement provision. The only difference between mandatory and voluntary regimes is the existence, in the enforcement provision, of a requirement that Internet content carry one of the defined ratings. A regime that does not require the application of the government's ratings system is a voluntary regime, while one that requires providers to apply the government's ratings system to all of their Internet content is a mandatory regime. Under a voluntary regime, content providers are free to apply a government-defined rating, apply no rating at all, or even to apply a rating defined by some other entity.<sup>199</sup>

To analyze the constitutional ramifications of putting government in the business of Internet content regulation, I return to the comparison of voluntary and mandatory rating regimes.

#### A. VOLUNTARINESS AND THE LEAST RESTRICTIVE MEANS

This is not the first article to consider the constitutional ramifications of mandatory rating regimes; some have concluded that the government can require Internet content providers to rate their content;<sup>200</sup> others who have concluded

---

198. See *supra* text accompanying notes 105-106.

199. Because a voluntary regime leaves content providers and content consumers free to use other methods for content regulation, a voluntary regime is also the best answer to the concern that government intervention in the market for content regulation will stifle development of optimal content regulation. See *supra* text accompanying notes 135-151; see also Weinberg, *supra* note 33, at 473 (arguing that a single ratings system defined by the government will “freeze technological development by eliminating competitive pressures leading to the introduction and improvement of new searching, filtering, and organizing techniques”). If the government regime is a voluntary one, it will not stifle the market for content regulation; it will participate in it. Under a voluntary regime, there is no reason why the government system must be the winner—others will still be free to develop competing regimes, and if the government's is deemed by those who demand content regulation to be inferior to others, it will languish. Cf. Lemley & McGowan, *supra* note 137, at 544-45 (citing as an example the federal government's effort in the 1970s to move America to the metric system). It is true that the government has at its disposal certain powers that will give its regime an advantage over others—the availability of criminal sanctions for mis-rating is an example—but under a voluntary regime, such advantages are just features to be compared to features offered by other content-regulation regimes. Far from stifling competition for content regulation, government involvement will promote it by adding another competitor.

200. Those concluding that governmentally mandated ratings would be constitutional include R. Polk Wagner, see Wagner, *supra* note 115, at 778-95

that mandatory ratings would be unconstitutional have done so for a variety of reasons.<sup>201</sup> It seems to me that the unconstitutionality of government-mandated ratings on the Internet is not even a close question, if for no other reason than the enormity of the burden it would place on Internet content providers.

The Supreme Court has always been particularly concerned about the burden of compliance with regulations affecting speech, invalidating laws that place additional burdens on speakers even without restricting publication.<sup>202</sup>

---

(concluding that a mandatory rating regime is likely constitutional if the government does not define the ratings vocabulary), and Lawrence Lessig, see Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 EMORY L.J. 869, 893 (1996) [hereinafter Lessig, *Reading the Constitution in Cyberspace*] ("I don't believe it will raise any substantial constitutional concerns."). Professor Lessig has since modified his position, arguing that the government may not mandate that content providers rate their content *according to a private ratings system*. Lessig, *What Things Regulate Speech*, *supra* note 20, at 668; see also Coralee Penabad, Comment, *Tagging or Not?—The Constitutionality of Federal Labeling Requirements for Internet Web Pages*, 5 UCLA ENT. L. REV. 355, 358-59 (1998) (concluding that a requirement of mandatory ratings combined with the *option* of using the federal government's own ratings system would be constitutional).

Another possibility is a regime under which both rating *and* filtering are mandatory. Under such a regime, content consumers would be denied the ability to choose whether or not to filter. If applied to any but obscene content, such a regime is almost certainly unconstitutional. See *Rowan v. United States Post Office Dept.*, 397 U.S. 728, 737 (1970); Wagner, *supra* note 115, at 771-73.

201. See, e.g., Steven G. Gey, *Reopening the Public Forum—From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1624 (1998) (public forum doctrine); Sullivan, *supra* note 109, at 1678-79 (forced speech and burden); Weinberg, *supra* note 33, at 474-76 (forced speech, compelled association, and chill); David K. Djavaherian, Note, *Reno v. ACLU*, 13 BERKELEY TECH. L.J. 371, 384 & n.95 (1998) (burden, citing Shapiro, *supra* note 128, at 118 and the district court opinion in *ACLU v. Reno*, 929 F. Supp 824, 847 (E.D. Pa. 1996)); Dobeus, *supra* note 31, at 653-54 (overbreadth, forced *false* speech, forced association, arbitrary and capricious enforcement, and chill); see also Balkin, *supra* note 11, at 1161-64 (mandatory rating of television broadcasts a prior restraint).

202. See *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417-18 (1993); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 227-28 (1987) (holding that an additional burden, even without "censorial motive" does not save a statute from First Amendment review).

Professor Lessig has suggested that a mandatory rating regime might also be constitutional as a "truth in labeling" law, like those laws requiring disclosure of the ingredients in food products. Lessig, *Reading the Constitution in Cyberspace*, *supra* note 200, at 894; see also Penabad, *supra* note 200, at 371, 374-76. It seems far from clear, however, that laws requiring the labeling of speech are subject to the same standard as those requiring the

The Court in *Reno* highlighted the enormous burden of the CDA's publication restriction on economically low-value Internet content,<sup>203</sup> and the district court decision in the same case emphasized the large burden that a mandatory ratings system would impose on Internet content providers as a whole.<sup>204</sup> Mandatory ratings would severely limit the "vast democratic fora"<sup>205</sup> that is the Internet, dramatically increasing the cost of producing Internet content. It was the *low* cost of producing content on the Internet that, in part, drove the Court's finding that it deserves the highest constitutional protection;<sup>206</sup> it would be amazing indeed for the Court to allow Congress to undermine such a fundamental benefit of the Internet by dramatically increasing the cost of producing Internet content when the Court so carefully circumscribed Congress's power to regulate Internet content at all. Even without performing the analysis mandated by the "least restrictive means"<sup>207</sup> requirement for content-based speech regulation, it is difficult to imagine such a heavy burden being placed on Internet content providers. As Kathleen Sullivan points out, "[o]ne is hard pressed to imagine mandatory self-rating being imposed on the covers of the *Nation* and the

---

labeling of other goods. See *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 795-96 (1988). In *Riley*, the Supreme Court struck a requirement that professional fundraisers disclose information about their fundraising practices and specifically the percentage of the funds raised that were actually passed on to the charities hiring the professional fundraisers. The State of North Carolina defended the regulation, in part, by contending that the forced disclosures pertained only to the fundraisers' profits and that therefore the Court should apply its "more deferential commercial speech principles" to the regulation. *Id.* at 795. The Court refused to do so, holding that, when evaluating a regulation that requires such a disclosure, one must look to the nature of the thing actually being impacted by the regulation: "[E]ven assuming, without deciding, that such speech in the abstract is merely 'commercial,' we do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech." *Id.* If the label is being applied to protected speech, avoiding First Amendment scrutiny by shifting the focus of the regulation away from the underlying content and to the labeling requirement is not a possibility.

203. *Reno v. ACLU*, 521 U.S. 844, 876-77 (1997).

204. *ACLU v. Reno*, 929 F. Supp. at 847.

205. *Reno v. ACLU*, 521 U.S. at 868.

206. *Id.* at 870.

207. See *Sable Communications of Cal., Inc., v. FCC*, 492 U.S. 115, 126 (1989) ("The Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.").

*National Review*.”<sup>208</sup> Although Sullivan’s statement lacks case citations and rigorous constitutional analysis, it elegantly captures what seems to be an unassailable point of constitutional law.

But First Amendment jurisprudence is not merely concerned with the magnitude of the burden imposed on speakers; it is the *relationship* between that burden and a regulation’s effectiveness in achieving the state’s legitimate interest—how “narrowly tailored”<sup>209</sup> the regulation is—that the Court examines when determining whether a given speech regulation is constitutional.<sup>210</sup> The government

may serve this legitimate interest [of protecting children from indecency], but to withstand constitutional scrutiny, it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms. It is not enough to show that the Government’s ends are compelling; the means must be carefully tailored to achieve those ends.<sup>211</sup>

If a speech regulation is content-based,<sup>212</sup> it is unconstitutional unless it is the “least restrictive means” of

---

208. Sullivan, *supra* note 109, at 1679; *see also* Lessig, *What Things Regulate Speech*, *supra* note 20, at 668 (using as an example a requirement that all magazines be sold from behind counters and accessible only on request).

209. *Reno v. ACLU*, 521 U.S. at 882.

210. At least two commentators have argued that the absolute magnitude of the burden is completely irrelevant—all that matters is whether there is a less restrictive means to achieving the end of protecting children. *See* Lessig, *What Things Regulate Speech*, *supra* note 20, at 631, 640; Eugene Volokh, *Freedom of Speech, Shielding Children, and Transcending Balancing*, 1997 SUP. CT. REV. 141, 148-49.

211. *Sable Communications of Cal., Inc.*, 492 U.S. at 126 (internal quotations and citations omitted).

212. Some have suggested that a governmental ratings and filtering statute might be considered a “zoning” regulation, and therefore be evaluated under the less severe constitutional standards applicable to “content neutral” speech regulations. *See* Lessig, *What Things Regulate Speech*, *supra* note 20, at 639-40 & n.31; *see also* Amy Fitzgerald Ryan, Note, *Don’t Touch That V-Chip: A Constitutional Defense of the Television Program Rating Provisions of the Telecommunications Act of 1996*, 87 GEO. L.J. 823, 832-33 (1999) (arguing that television V-chip regulation is a time, place, and manner restriction). *See generally* *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). Such an assertion seems problematic at best. In *Renton*, the asserted regulatory interest was avoiding the creation of geographically concentrated districts of unseemly behavior in the city; the city had targeted “the secondary effects of adult theaters, and not . . . the content of adult films themselves.” *Id.* at 47 (emphasis added). In addition to noting *Renton*’s inapplicability, the Court expressly rejected a “cyberzoning” rationale in *Reno* for exactly that reason. *See Reno v. ACLU*, 521 U.S. at 867-68; *see also* *United States v. Playboy Entm’t Group, Inc.*, 120 S. Ct. 1878, 1885, 1887 (2000); *City of Erie v. Pap’s A.M.*, 120

achieving the state's legitimate end.<sup>213</sup> The test prevents overbroad speech regulation. A content-based restriction on protected speech is permissible only to the extent the restriction serves a compelling state interest; to allow a restriction that is broader than the least restrictive one "would be to restrict speech without an adequate justification, a course the First Amendment does not permit."<sup>214</sup> The requirement is also a stringent one: the Court will examine even *hypothetical* restrictions in order to find one that is less restrictive than the one being evaluated.<sup>215</sup> The existence of a less restrictive means of achieving the same end dooms a proffered regulation

---

S. Ct. 1382, 1393 (2000) (plurality opinion); *id.* at 1402 (opinion of Souter, J.). In *Pap's A.M.*, the Court affirmed the "secondary effects" test for whether a speech regulation is content-neutral, thereby eliminating another possible justification for applying lower scrutiny: that a zoning regulation allows alternative sources of the same speech. The Court ruled that even an *absolute* ban on nude dancing is subject to the lower standard for content-neutral speech regulation if the ban is premised on controlling the secondary effects of the dancing. *Id.*

The Internet, as so many have commented, has no analogous geographic concentration. *E.g.*, Christopher M. Kelly, Note, "*The Spectre of a 'Wired' Nation*": Denver Area Telecommunications Consortium v. FCC and First Amendment Analysis in Cyberspace, 10 HARV. J.L. & TECH. 559, 628-31 (1997). The Internet's organization depends entirely on how it is navigated, making purveyors of mature content either randomly dispersed or tightly concentrated—the organization of such sites is within the control of the viewer. Thus, the government cannot rely on some secondary effect that Internet speech has on the surrounding area. It must rely instead on the nature of the speech itself to justify the government's regulation. The Court's holding that "[r]egulations that focus on the direct impact of speech on its audience are not properly analyzed under *Renton*," *Reno v. ACLU*, 521 U.S. at 868 (internal quotations omitted), means that any Internet rating and filtering regime would not be subject to *Renton's* lower standard.

Without a geographical "secondary effects" rationale on which to rely, any Internet ratings system could only be characterized as content-based. The ratings statute would not be mere zoning; by authoring the applicable ratings system, the government will provide additional parental control only along the lines supported by the government's ratings vocabulary: providing parental control over certain types of content, but not over others. By exercising the discretion to select which categories of speech can be filtered, the government will place its regime squarely into the category of content-based regulation. *Cf.* *Rowan v. United States Post Office Dept.*, 397 U.S. 728, 737 (1970) (filtering regulation constitutional because the government exercises *no* discretion over categories to be filtered).

213. *Playboy Entm't Group, Inc.*, 120 S. Ct. at 1886; *see also Reno v. ACLU*, 521 U.S. at 874 ("That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.").

214. *Playboy Entm't Group, Inc.*, 120 S. Ct. at 1886.

215. *Id.* at 1891-92; *Reno v. ACLU*, 521 U.S. at 879.

as unconstitutional, and it is the government's burden to establish that no less restrictive (hypothetical) alternative exists.<sup>216</sup>

The shortfalls of mandatory regimes become all the more obvious when mandatory regimes are compared with voluntary ones for both effectiveness and burden. If the interest supporting creation of government Internet content regulation is the protection of children from Internet content that is harmful to minors,<sup>217</sup> a mandatory rating regime is not the least burdensome way to achieve that purpose.

### 1. Effectiveness

Even with the benefit of the charitable assumption that all Internet content providers would respond to their duty under a mandatory regime by rating accurately,<sup>218</sup> there is no way in

216. *Playboy Entm't Group, Inc.*, 120 S. Ct. at 1888, 1891-92.

217. For the purpose of this limited discussion about the constitutionality of a federal ratings regime, I will abandon my use of the intentionally opaque concept of "mature content," see *supra* note 8, and instead rely on the label for speech from which the state has a legitimate interest in protecting children: speech that is "harmful to minors." See *Reno v. ACLU*, 521 U.S. at 865; *FCC v. Pacifica Foundation*, 438 U.S. 726, 740 (1978) (comparing the standard for "obscenity" with that for "indecent"); *Miller v. California*, 413 U.S. 15, 24-25 (1973) (establishing the test for what speech is "obscene"). I use the term here in its circular sense—that is, I use "harmful to minors" to describe that content from which the state has a legitimate interest to protect children. I take no position whatsoever on what kind of content that is or should be or even what the Court considers is the kind of content from which the state has an interest in shielding children. Compare Lessig, *What Things Regulate Speech*, *supra* note 20, at 638-39 (citing *Ginsberg v. New York*, 390 U.S. 629 (1968) for a standard of obscenity adjusted for the age of the child), with *Pacifica*, 438 U.S. at 740 ("Prurient appeal is an element of the obscene, but the normal definition of 'indecent' merely refers to nonconformance with accepted standards or morality."), Balkin, *supra* note 11, at 1133 (noting that indecent expression may include "serious discussions of AIDS and homosexuality"), and Shea, *supra* note 163, at 171 n.17 ("The distinction between 'obscene' and 'indecent' speech was drawn [in *Pacifica*] because 'indecent' speech is presumed to have 'some social value' even if the speech 'lacks literary, political, or scientific value.'"). See also Marion Hefner, *Roast Pigs and Miller-Light: Variable Obscenity in the Nineties*, 1996 U. ILL. L. REV. 843, 876 (1996) (arguing that states should be permitted to regulate access by minors to harmful material without having to satisfy traditional standards of obscenity).

218. Although I offer a limited analysis of the extraterritorial effects of a federal ratings regime, see *infra* text accompanying notes 263-72, a complete analysis of whether the United States could extraterritorially enforce a mandatory regime is beyond the scope of this Article. However, if the United States *cannot* successfully impose a mandatory regime on foreign content providers, then even the few arguments in favor of a mandatory regime melt

which a mandatory regime is more effective than a voluntary one at screening children from content that is harmful to minors. Under a mandatory regime, all content is rated, allowing consumers to set their Internet software to exclude all content rated “harmful to minors.” Under a voluntary regime, content that is harmful to minors is either rated as “harmful to minors” or it is not rated at all.<sup>219</sup> Thus, even if there is unrated content on the Internet, no content that is harmful to minors will make it through the filter. Content rated as harmful to minors is excluded by setting one’s Internet software to filter it, and unrated content is excluded by setting the software to filter all unrated content. Only content actually rated as suitable for all will make it through the filter.

The problem with voluntary regimes is not ineffectiveness but overinclusiveness. When one sets one’s Internet software to exclude all unrated content, all the unrated content that is suitable for children is excluded as well. While the set of content excluded under a mandatory regime is content that is harmful to minors, the set of content excluded under a voluntary regime is: (a) all content that is harmful to minors (both rated and unrated) and (b) unrated content that is suitable for all ages. Although the voluntary regime is overinclusive by filtering out more content than is desirable, it is completely effective at achieving the state’s interest of protecting children from content that is harmful to minors.

---

away because the one advantage it has over a voluntary regime—the ability to allow content consumers to perfectly identify the maturity of Internet content—would no longer be present if the Internet still contained a great deal of unrated content.

219. Not all content that is harmful to minors will go unrated. Mainstream producers of content that is likely harmful to minors, such as *Playboy*, will rate their content as mature in order to preserve their standing in the community as socially responsible sources of mature content, much as beer companies are willing to undertake substantial advertising campaigns against drunk driving. Additionally, some producers of mature content will want to rate their content as mature in order to attract an audience interested in seeing mature content. See Balkin, *supra* note 11, at 1170 n.72 (noting that even though the Motion Picture Association has dropped the “X” rating in favor of “NC-17,” “X” is still used “by adult video producers as a way of emphasizing the salacious nature of their product”); Tom Shales, *Chip of Fools Any Way You Program It, The V-Chip Is a Long Stride Toward Censorship*, WASH. POST, Mar. 10, 1996, at G1 (quoting an unnamed network executive as indicating that some networks might use the ratings accompanying the V-Chip to distinguish themselves as the “R-rated network”).



## 2. Burden

If both regimes are equally effective at serving the permissible state interest of protecting children from content that is harmful to minors, the analysis shifts to the next portion of the narrow tailoring test: Which regime imposes the least burden in the course of satisfying that interest?<sup>220</sup> The problem is that when one evaluates each regime for how much burden it imposes, the answers are facially incommensurable because they appear to affect different rights. On one hand, mandatory regimes are poorly tailored because they impose a burden on the right of all content providers to *speak*. If the end served by the regime can be served by a less-onerous burden (placing that burden only on those content providers who choose to rate), then the regime is not narrowly tailored to serving the permissible state interest. On the other hand, the primary burden of voluntary regimes is on the right of content consumers, and specifically minors, to *listen*.<sup>221</sup> Voluntary regimes are not perfectly tailored because, even though they impose lesser burdens on speakers than do mandatory regimes, they—without any state interest in doing so—also screen from minors a great deal of unrated content that is suitable for any age.

But on closer examination of the unintended screening caused by a voluntary regime, the screening of unrated suitable-for-all content turns out to be not much worse than the

---

220. Some of the arguments made in Part II.D—emphasizing the economic superiority of voluntary content regulation—apply equally to this question and militate in favor of a voluntary system. But the First Amendment is not driven by pure economics; although the economic advantage of one regime over another may affect a particular regime's constitutionality, First Amendment analysis is not a strict application of economic principles.

221. See *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982) (plurality opinion) (collecting sources). Minors, too, have First Amendment rights, even if those rights are curtailed when it comes to speech that is harmful to them. See *Carey v. Population Servs. Int'l*, 431 U.S. 678, 692 & n.14 (1977) (plurality opinion); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-13 (1975) (“[M]inors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them.”). Adults have a constitutional right of access to both speech that is suitable for all ages and speech that is harmful to minors, *Reno v. ACLU*, 521 U.S. at 875; *Sable Communications, Inc., v. FCC*, 492 U.S. 115, 126-27 (1989) (citing *Butler v. Michigan*, 352 U.S. 380, 383 (1957), and Justice Frankfurter’s famous quote therein that completely banning indecent material in order to keep it away from children “is to burn the house to roast the pig”).

effects of a mandatory regime. Under a mandatory regime, content providers still have a choice of whether or not to rate; mandatory regimes simply require that content providers who choose not to rate must also choose not to publish.<sup>222</sup> The same suitable-for-all content that would go unrated in a voluntary regime would likely go unrated—and consequently unpublished—in a mandatory regime.<sup>223</sup>

It is the difference between content going unrated and content going unpublished that demonstrates most clearly why a mandatory regime could never be constitutional. One characteristic that can control whether content will be rated is its value, in the economic as opposed to the moral or literary sense. Economically valuable content can support the cost of rating, economically low-value content cannot. When one considers the effect of the two types of regimes on economically low-value content, the extra burden of the mandatory regime becomes clear: under a voluntary regime, economically low-value content will get fewer viewers, under a mandatory regime, it will be eliminated.<sup>224</sup>

---

222. Under mandatory rating, content providers do have the additional choice of rating their content as the “most mature,” providing them with a defense both to charges of not rating and to providing a falsely low rating. But requiring that content providers avail themselves of this option—applying a false rating to their content in order to avoid liability—would itself violate the First Amendment: On top of the usual problems created by forcing content providers to speak when they would not, see *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (First Amendment guarantees a right not to speak), such a “safe harbor” would effectively require many content providers to speak *falsely* about their content when they would not. See Dobeus, *supra* note 31, at 653-54 (mandatory ratings unconstitutional because they force content providers to make false statements about their speech); see also Weinberg, *supra* note 33, at 474-76 (mandatory ratings violate the First Amendment because they require forced speech). The availability of an option that is itself impermissible speech regulation does not make a mandatory regime more narrowly tailored. Of course, forced speech is not a concern under a voluntary regime.

223. The reason why the effect is “not much worse” instead of “no worse” is because more content would go unrated under a voluntary regime than under a mandatory one. This is so because the decision not to rate has a more profound impact under a mandatory regime. Under a voluntary regime, the cost of not rating is having one’s viewership reduced to only adults. Under a mandatory regime, the cost of not rating is loss of *all* viewership. There will be some content providers for whom the cost of rating exceeds the cost of losing the children’s audience (as would happen under a voluntary regime) but does not exceed the cost of losing their whole audience (as would happen under a mandatory regime). Those content providers will rate under a mandatory regime but not under a voluntary one.

224. Additionally, some content providers may choose not to rate high-

All this is not to say that a voluntary regime is free from cost. A voluntary rating regime will still adversely affect the rights of speakers by marginally increasing their cost of reaching an audience. A voluntary regime will result in reduced traffic to unrated sites suitable for all ages, because some portion of the Internet community will configure their software to exclude both sites that are rated "harmful to minors" and sites that are unrated.<sup>225</sup> Consequently, in order

---

value content because they object to the idea of ratings. Weinberg, *supra* note 33, at 473; see also Jonathan Wallace, *Why I Will Not Rate My Site*, at <http://www.spectacle.org/cda/rate.html> (last visited Aug. 27, 2000). A voluntary regime is also superior for these kinds of non-raters; the penalty for following one's conscience under a mandatory regime is being silenced.

225. The burden of reduced traffic was cited by the district court as one reason to enjoin application of the COPA. *ACLU v. Reno (COPA)*, 31 F. Supp. 2d 473, 492 (E.D. Pa. 1999), *aff'd*, 217 F.3d 162 (3d Cir. 2000) ("The plaintiffs have shown that they are likely to convince the Court that implementing the affirmative defenses in COPA will cause most Web sites to lose some adult users to the portions of the sites that are behind screens."). On blocking unrated content, see Balkin, *supra* note 11, at 1164 (discussing voluntary rating of television using the V-chip for filtering).

Jonathan Weinberg paints what I think is a somewhat accurate, if exaggerated, picture of the future under a voluntary regime. In order to be "safe," parents will have to block unrated sites and will consequently "have a browser configured to accept duly rated mass-market speech from large entertainment corporations, but to block out a substantial amount of quirky, vibrant individual speech from unrated (but child-suitable) sites. This prospect is disturbing." Weinberg, *supra* note 33, at 476-77; see also Benjamin R. Barber, *The Market as Censor: Freedom of Expression in a World of Consumer Totalism*, 29 ARIZ. ST. L.J. 501, 506 (1997); Kinney, *supra* note 94, at 95 ("Choices like 'more' or 'less' government could become obsolete if the technocratic, quasi-parental, service-marked colossus reduces your decision-making capacity to the level of 'Would you like milk or sugar with your Prozac?'"); ACLU, *Fahrenheit 451.2*, *supra* note 13 ("The Internet will become bland and homogenized.").

There are two reasons why I think Professor Weinberg's concerns are unwarranted. First, it's not at all clear that only "large entertainment corporations" will rate their content. Assuming for the sake of argument an extremely costly ratings system, other large content providers, such as the Smithsonian Institute, NASA, and the National Institutes of Health, will likely rate. Organizations such as these are already effectively self-rating by ensuring that the material they provide is age-appropriate. Second, I don't see why the prospect is "disturbing." Parents have a problem: shielding their children from inappropriate content. If a particular content provider is willing to help parents defray the cost of solving that problem, in this case by rating its content, then it seems completely appropriate for that content provider to receive additional traffic as a reward.

But more importantly, Weinberg's "disturbing" scenario is more likely to be played out in a world *without* ratings than in a world with them. There will continue to be demand for services that make it easier for parents to shield their children from mature content on the Internet. Ratings regimes allow

to maintain the same level of traffic, sites carrying content that is suitable for all ages may have to incur the additional cost of rating.<sup>226</sup> Regardless of whether they choose to rate, speakers will be burdened, either by suffering less traffic, or by suffering the increased cost of getting that traffic by expending the money or effort to rate.<sup>227</sup>

The cost of rating is most obvious when applied to economically low-value content. Economically low-value content will not justify the cost of rating, and consequently, under even a voluntary regime, providers of such low-value speech will suffer reduced traffic from their lack of a rating.<sup>228</sup> Of course, this is still superior to the effect of mandatory rating on content whose value cannot justify the added cost of rating: removal from the Internet.

There is another important distinction that helps demonstrate the extra burden imposed by a mandatory regime: loss of access. Under any content-regulation regime, speakers' loss of audience is perfectly mirrored by content consumers' loss of access. Exploring the logical limits of lost access by class of listener, adults versus children, sheds more light on the increased burden of a mandatory regime. Under a mandatory regime, children and adults both lose access to all the low-value suitable-for-all content on the Internet—a huge loss indeed. Under a voluntary regime, it is only children who lose access to

---

individuals to make credible statements about their content, reducing the need for other forms of content regulation that lend themselves more readily to complete editorial control over what content makes it to the consumer's screen, such as the use of third-party portals or search engines that promise to present only non-mature content. See Wagner, *supra* note 115, at 787-88 (describing a "convergence" that would reduce the diversity of content available on the Internet).

226. Of course, only a portion of the costs of rating will be attributable to maintaining the *same* level of traffic. Not only would the existence of a coherent regime of content regulation likely stimulate traffic by those who would otherwise have chosen to stay away from the Internet for fear of being exposed to mature content, but content providers without mature content will be able to "advertise"—at low cost—their lack of mature content through their rating. The result is that content providers who rate will not merely maintain their current level of traffic, they will likely see it increase over its current level.

227. See Wagner, *supra* note 115, at 782-83.

228. Interestingly, producers of economically low-value *harmful-to-minors* speech will not be so heavily burdened. Most consumers are likely to set their Internet software to treat unrated and harmful-to-minors content similarly. Thus low-value suitable-for-all content will be lumped in with the content that is harmful to minors. But harmful-to-minors content suffers no burden from being "lumped in" with harmful-to-minors content.

low-value suitable-for-all content, because adults can set their Internet software to display the low-value suitable-for-all content that is unrated.<sup>229</sup> A mandatory regime also deprives adults and children of all access to economically low-value *harmful-to-minors* content, and, at least with regard to adults, that loss weighs against the regime being narrowly tailored.<sup>230</sup> Under a voluntary regime, however, adults can still access economically low-value harmful-to-minors content.

The gap between the burden imposed by voluntary and mandatory regimes continues to widen when one examines the practical, as opposed to the logical, degree to which access is lost. Under a voluntary regime, many children will obtain access to some unrated content that is suitable for all ages if their parents allow it, because their parents have the choice of whether to filter. Under a mandatory regime, there is no way for children to get access to economically low-value suitable-for-all content because it will have been removed from the Internet entirely. And it is not only the interests of children that are poorly served by a mandatory regime. Their parents' interests are also insulted by mandatory rating. Parents—exercising a right the Supreme Court has recognized as practically inviolate, the right to direct their children's upbringing<sup>231</sup>—may wish to give their children access to low-value, and therefore unrated, content. That choice, the choice of parents to provide children access to economically low-value suitable-for-all and even to low-value harmful-to-minors<sup>232</sup> speech, does not exist under a mandatory regime because that low-value content will have been removed. The increased burdens of a mandatory regime on parental rights also argue for their constitutional infirmity.<sup>233</sup>

---

229. Both minors and adults will lose access to some small amount of content because its economic value is so low that content providers are not willing to either rate it or provide it in what is now a somewhat more limited market for unrated content.

230. See *Reno v. ACLU*, 521 U.S. 844, 875 (1997).

231. See *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (“[C]onstitutional interpretation has consistently recognized that the parents’ claim to authority in their own household to direct the rearing of their children is basic in the structure of our society.”); see also Kelly, *supra* note 212, at 624.

232. Maintaining its strong focus on parental choice, the Supreme Court highlighted in *Reno v. ACLU* the danger that the CDA would apply to a parent providing access to material that the parent “in her parental judgment, deems appropriate.” 521 U.S. at 878.

233. See *id.* One commentator has argued that parental control is the “real issue” behind the Court’s willingness to allow much greater regulation of

A voluntary regime would be as effective at shielding children from content that is harmful to minors while imposing lower burden on protected rights than a mandatory regime. The lesser burden imposed by a voluntary regime means that a mandatory regime could *never* be constitutional.<sup>234</sup>

### 3. Implications for Publication Restriction Regimes

But this analysis doesn't end with mandatory self-rating regimes. Just as voluntary self-rating's existence necessitates a finding that mandatory self-rating is unconstitutional, it also necessitates a finding that government-sponsored publication restrictions are unconstitutional because they are actually a form of mandatory self-rating.<sup>235</sup> Although some have argued that publication restrictions are superior to mandatory rating because they only burden speech that is harmful to minors,<sup>236</sup> the fact is that publication restrictions must, as a matter of logic, impose a *greater* burden than mandatory filtering.

The existence of a publication restriction requires every Internet publisher to evaluate their content to determine whether it violates the publication restriction; that process is functionally the same as the process content providers must go through under a mandatory rating regime to determine which rating to apply to their content. Content providers whose

---

broadcast media than of other forms of speech. See Balkin, *supra* note 11, at 1138-39. If that is so, then a regime that *denies* parents control over what content their children can see is unlikely to survive the Court's review.

234. Although some have cited *Meese v. Keene*, 481 U.S. 465 (1987), for the proposition that the government can mandate Internet ratings, see, e.g., Lessig, *Reading the Constitution in Cyberspace*, *supra* note 200, at 781-83; Wagner, *supra* note 115, at 781-83, 785, 794; Penabad, *supra* note 200, at 372-73, that case cannot support a proposition as weighty as saying the government can mandate Internet content ratings. *Keene* simply never addressed the burden of being required to rate one's content. *Keene* did address burden, but it did so only in the context of addressing the burden—in the form of *stigma*—one bears by having one's content labeled “propaganda.” See *Keene*, 481 U.S. at 480; *id.* at 492 (Blackmun, J., dissenting). Nowhere in *Keene* did the Court address the cost of actually determining which rating should be applied to the underlying content. Given the Court's picture of the Internet as “vast democratic fora,” *Reno v. ACLU*, 521 U.S. at 868, any case failing to consider the cost of rating is dubious authority for the statement that government-mandated ratings are constitutional.

235. There are some ways in which publication restrictions are less constitutionally problematic than the mandatory application of self-generated ratings. For instance, publication restrictions do not raise the problem of “forced speech.” See *supra* text accompanying note 222.

236. See Lessig, *What Things Regulate Speech*, *supra* note 20, at 639 n.31.

content is not economically worth the rating process will similarly be unwilling to evaluate their content to determine whether or not it violates the publication restriction. Worse yet, publication restrictions don't offer the choice offered by mandatory rating regimes of simply rating the content and publishing as before; they require the content either to be removed from the Internet or, possibly, to be placed behind barriers that prevent unwanted viewing.<sup>237</sup> No reincarnation of the Communications Decency Act, including the Child Online Protection Act, should ever be found constitutional as long as filtering, voluntary<sup>238</sup> or mandatory, is an available option.<sup>239</sup> Indeed, the Supreme Court made clear just last term that, whenever targeted blocking (or filtering) is available, a ban can never be constitutional.<sup>240</sup>

---

237. Publication restrictions also fall short on the other criterion used to evaluate the validity of content-based regulation: they are less effective than voluntary self-rating combined with filtering. It is possible that content housed on offshore Internet servers will be beyond the reach of U.S. laws, and the inability of regulation to reach offshore content reduces the effectiveness of publication restrictions. *See, e.g.*, Staiman, *supra* note 100, at 892 (discussing how after the French government had content critical of President Francois Mitterand removed from a French server, it was simply re-posted on foreign servers beyond the French government's control); *see also* Kelly, *supra* note 212, at 574-75. This failing of publication restrictions has been an element of two court decisions against application of the CDA and the COPA. *See* ACLU v. Reno, 929 F. Supp. 824, 882-83 (E.D. Pa. 1996) (opinion of Dalzell, J.); ACLU v. Reno (COPA), 31 F. Supp. 2d 473, 496 (E.D. Pa. 1999), *aff'd*, 217 F.3d 162 (3d Cir. 2000). Filtering, by providing the option to block unrated (offshore) sites, is more effective at shielding children from harmful-to-minors content than publication restrictions can be. Only if offshore sites intentionally mis-rate will content that is harmful to minors get through to children using filtering software that blocks unrated content. The Supreme Court acknowledged the ineffectiveness of publication restrictions on overseas content as an issue in *Reno v. ACLU*, but refused to address it as complicated and unnecessary. 521 U.S. at 878 n.45. The problem of intentionally mis-rated offshore sites is addressed *infra* in the text accompanying notes 273-74.

238. It is not necessary to follow the three-step approach I use here of establishing that voluntary ratings are less burdensome than mandatory ratings and that mandatory ratings are less burdensome than publication restrictions in order to conclude that voluntary ratings must therefore be less burdensome than publication restrictions. One commentator has pointed out directly (albeit outside of constitutional analysis) that voluntary ratings are less burdensome than publication restrictions. *See* Delacourt, *supra* note 172, at 228-29.

239. *See also* Volokh, *Freedom of Speech in Cyberspace*, *supra* note 111, at 428-34 (concluding that filtering is a less restrictive alternative than publication restrictions).

240. *United States v. Playboy Entm't Group, Inc.*, 120 S. Ct. 1878, 1887 (2000) ("Simply put, targeted blocking is less restrictive than banning, and the

## B. THE INTEREST IN ENABLING CONSUMER CHOICE OF CONTENT

Use of a voluntary regime should not only ease our constitutional qualms about government regulation of the Internet, it should eliminate them by juxtaposing the constitutional rights of speakers with the interests of content consumers to control what content flows into their homes. In *Rowan v. United States Post Office Department*,<sup>241</sup> the Supreme Court considered the constitutionality of a statute allowing recipients of unwanted mailed advertising to avoid receiving such mail in the future.<sup>242</sup> Under the provision at issue, the recipient would notify the Postmaster General that they no longer wanted mail from a particular sender, and the Postmaster General would in turn issue an order to the sender to cease sending materials to the addressee and to delete the addressee from all mailing lists in the sender's possession.<sup>243</sup> A sender of unsolicited advertising challenged the statute, which the Court held was constitutional. The Court recognized the sender's First Amendment right to send the advertisements, but also recognized that "the right of every person 'to be let alone' must be placed in the scales with the rights of others to communicate"<sup>244</sup> and found that "a mailer's right to communicate must stop at the mailbox of an unreceptive recipient."<sup>245</sup> The Court did not base its decision on the nature of the advertisements, but relied instead on the individual's absolute right to decide what could and could not come into his home.<sup>246</sup> Under *Rowan*, empowering individuals to filter the

---

Government cannot ban speech if targeted blocking is a feasible and effective means of furthering its compelling interests.").

241. 397 U.S. 728 (1970).

242. *Id.* at 729-30.

243. *Id.* The statute, formerly 39 U.S.C. § 4009, is now codified at 39 U.S.C. § 3008. See Postal Reorganization Act, Pub. L. No. 91-375, 84 Stat. 719, 748-49 (1970).

244. *Rowan*, 397 U.S. at 736.

245. *Id.* at 736-37.

246. See *id.* at 736-38. The statute is limited to mail that the addressee found "erotically arousing or sexually provocative," but left complete discretion to assign that label up to the addressee. *Id.* at 730. Indeed, the Court determined that an addressee "may prohibit the mailing of a dry goods catalog because he objects to the contents—or indeed the text of the language touting the merchandise." *Id.* at 737; see also Wu, *Application-Centered Internet Analysis*, *supra* note 28, at 1174-78 (arguing that the degree of scrutiny the Supreme Court applies to speech regulation should vary based on the invasiveness of the form of speech being regulated and citing, among other cases, *Rowan*).



content coming into their home, whether it is content destined for themselves or for their children,<sup>247</sup> might seem like a constitutional non-issue.

But *Rowan* does not completely answer the question of government involvement in filtering, since the statute reviewed in that case did not give the government any role in determining *which* content would go undelivered. The Postmaster General simply acted on the wishes of the recipients.<sup>248</sup> Emphasizing this portion of the *Rowan* opinion, and contrasting *Rowan* with two other cases involving the postal service, *Lamont v. Postmaster General*<sup>249</sup> and *Bolger v. Young's Drug Products Corp.*,<sup>250</sup> Lawrence Lessig argues that *Rowan's* rule is that the government can enable filtering *only* if it has no say in the criteria used to conduct the filtering.<sup>251</sup> That claim merits some attention.

As Professor Lessig points out, a major distinction between *Rowan*, in which the government's filtering statute was found constitutional, and *Lamont* and *Bolger*, in which mail filtering regimes were found unconstitutional, is the existence of government discretion about what mail would be filtered. But to view this as the critical difference between the two *lines* of cases ignores the basis for the Court's decision in *each* of the cases.

In *Lamont*, the government was seeking to apply a statute requiring the Postal Service to withhold and destroy mail containing communist propaganda unless the recipient indicated his desire to receive such mail by returning a notification card to the post office.<sup>252</sup> The Court said nothing about whether or not the federal government can create criteria for filtering mail. Rather, the Court decided the case exclusively on the constitutional right of the recipient to freely

---

247. The statute also allows an addressee to demand that senders no longer send mail to the minor children in the household. *Rowan*, 397 U.S. at 730 n.1.

248. *Id.* at 730.

249. 381 U.S. 301 (1965).

250. 463 U.S. 60 (1983).

251. See Lawrence Lessig, *The Constitution of Code: Limitations on Choice-Based Critiques of Cyberspace Regulation*, 5 COMM. LAW CONSPECTUS 181, 189-90 (1997); see also Lessig, *What Things Regulate Speech*, *supra* note 20, at 666-67.

252. 381 U.S. at 302-04. After receiving the card, the post office would add the recipient to a list of all people evidencing a desire to receive communist propaganda. *Id.*

receive such mail, concluding that placing on recipients an affirmative duty to request certain mail abridged their First Amendment rights.<sup>253</sup> In *Bolger*, the filtering statute prohibited mailing of unsolicited advertisements for contraceptives.<sup>254</sup> Again, the Court did not say that the federal government can *never* specify filtering criteria. Rather, the Court found the statute unconstitutional because it prohibited the mailing of material that was merely “offensive.”<sup>255</sup> “At least where obscenity is not involved, we have consistently held that the fact that speech may be offensive to some does not justify its suppression.”<sup>256</sup>

In neither *Lamont* nor *Bolger* did the Court comment on the *existence* of government criteria as a reason for invalidating the statutes. In *Lamont* it was the affirmative duty put on the recipient to request certain mail,<sup>257</sup> in *Bolger* it was that the criteria chosen by the government were constitutionally infirm.<sup>258</sup> There is no reason to think that a statute similar to the one at issue in *Bolger* could not be applied to speech that the government has a legitimate interest in prohibiting, such as obscene speech.<sup>259</sup> *Lamont* may be about filtering, but it is about filtering of the most oppressive kind—more oppressive than any regime proposed for the Internet. *Bolger* is not about filtering at all but rather about what kinds of speech the government can constitutionally regulate. It only follows from core First Amendment law that, in order for the government to constitutionally exercise its discretion about creating filters and making them available for discretionary use, it must limit itself to those types of speech the government has a

---

253. See *id.* at 307 (“We rest on the narrow ground that the addressee in order to receive his mail must request in writing that it be delivered. This amounts in our judgment to an unconstitutional abridgment of the addressee’s First Amendment rights.”).

254. 463 U.S. at 61-63. Congress has not changed the statute since *Bolger* was decided. See 39 U.S.C. § 3001(e)(2) (1994).

255. *Bolger*, 463 U.S. at 71-72.

256. *Id.* at 71 (quoting *Carey v. Population Servs. Int’l*, 431 U.S. 678, 701 (1977)).

257. The Court was careful to point out that, because the material being delivered was communist propaganda, recipients might lose their jobs by putting themselves on a list to receive the mail in question. *Lamont*, 381 U.S. at 307.

258. See *Bolger*, 463 U.S. at 71.

259. See, e.g., *Hamling v. United States*, 418 U.S. 87, 98 (1974) (applying the Comstock Act, 18 U.S.C. § 1461, to the mailing of obscene speech).

constitutionally recognized interest in regulating. As the Court pointed out in *Erznoznik v. City of Jacksonville*:<sup>260</sup>

The plain, if at times disquieting, truth is that in our pluralistic society, constantly proliferating new and ingenious forms of expression, "we are inescapably captive audiences for many purposes. . . ." Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, absent the narrow circumstances described above, the burden normally falls on the viewer to "avoid further bombardment of (his) sensibilities by averting (his) eyes."<sup>261</sup>

But that is not a rule unique to filtering, it is the rule for all laws affecting speech. It was important in *Rowan* that the government had not established the criteria being applied to filter mail; if it had, that set of criteria would have been subject to review under First Amendment principles. But there is nothing in *Rowan* to suggest that the existence of government criteria would have made the statute invalid without regard to the criteria themselves. If there is a reason why the government may not establish a ratings system for voluntary use by content providers and content consumers, it must be found in cases other than *Rowan*, *Lamont*, and *Bolger*.<sup>262</sup>

#### C. EXTRATERRITORIAL APPLICATION OF FEDERAL RATINGS LAW

One concern voiced by those opposed to government regulation of Internet content is that governments will attempt<sup>263</sup> to apply their content regulations

---

260. 422 U.S. 205 (1975).

261. *Id.* at 210-11 (footnote omitted) (quoting, in turn, *Rowan*, 397 U.S. at 736 and *Cohen v. California*, 403 U.S. 15, 21 (1971)); *see also* *United States v. Playboy Entm't Group, Inc.*, 120 S. Ct. 1878, 1886 (2000).

262. Voluntary regimes have the additional advantage, from a constitutional perspective, that they cannot be violated without action that would unmistakably put the content provider on notice that he is at some peril. *Cf. Lambert v. California*, 355 U.S. 225, 228-30 (1957). Just as it would be a shame if we were to define the parts of the Internet merely by the maturity of the content found in them, it would be a pity if—as would be the case under either a mandatory rating regime or a publication restriction—publication on the Internet could be considered, like the offering of securities or the possession of a firearm, "the commission of [an act], or the failure to act under circumstances that should alert the doer to the consequences of his deed." *Id.* at 228.

One commentator has also argued that voluntary rating, in the context of broadcasters and the V-chip, also ameliorates another problem inherent in mandatory ratings: prior restraint. *See* Balkin, *supra* note 11, at 1164.

263. The subject of extraterritorial application of law to foreign Internet users has been comprehensively treated by Professor Jack Goldsmith in four

extraterritorially.<sup>264</sup> Because Internet content viewed in the United States may be published anywhere on the globe, it may be necessary to apply U.S. content regulation to foreign content providers in order to make it effective. But at the same time it would be unfair for U.S. authorities to apply U.S. content regulation to foreign content providers whose content is directed to viewers outside the United States; it is hard to see the federal interest in regulating content published in France for French viewers. Voluntariness both eliminates the danger of unfair application of a statute enforcing a U.S. ratings system and facilitates justified application of federal content regulation by prefacing any content provider's potential liability on actually rating his or her content using the U.S. government's ratings system.

#### 1. Avoiding Unfair Extraterritorial Application of Federal Internet Content Regulation

Unfair application of a voluntary federal rating regime to foreign content providers is impossible for two reasons, one of them a product of international and federal constitutional law and one a consequence of the substantive provisions that any such regime must have.

---

articles: Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199 (1998) [hereinafter Goldsmith, *Against Cyberanarchy*]; Jack L. Goldsmith, *The Internet and the Abiding Significance of Territorial Sovereignty*, 5 IND. J. GLOBAL LEGAL STUD. 475 (1998); Jack Goldsmith, *Regulation of the Internet: Three Persistent Fallacies*, 73 CHI.-KENT L. REV. 1119 (1998); and Jack Goldsmith, *Internet Gambling Legislation*, *supra* note 106, and the arguments contained in this section stem in large part from that work.

264. See also Delacourt, *supra* note 172, at 228. The concern that regulations will be applied extraterritorially is actually a complaint made against *all* government attempts to regulate activity on the Internet. See, e.g., Serge G. Avakian, *Global Unfair Competition in the Online Commerce Era*, 46 UCLA L. REV. 905, 921-26 (1999) (Lanham Act); Kenneth W. Brakebill, *The Application of Securities Laws in Cyberspace: Jurisdictional and Regulatory Problems Posed by Internet Securities Transactions*, 18 HASTINGS COMM. & ENT. L.J. 901, 910-32 (1996) (securities laws); Jonathan Gaskin, *Policing the Global Marketplace: Wielding a Knife in a Gunfight*, 38 COLUM. J. TRANSNAT'L L. 191, 197-210 (1999) (taxation); David R. Johnson and David Post, *Law And Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1371 (1996). See generally Goldsmith, *Against Cyberanarchy*, *supra* note 263, at 1199 n.3 (collecting sources). Professor Goldsmith describes anti-regulation sentiment as being premised on three arguments, first, that application of regulation to acts abroad is impermissibly extraterritorial, second, that unilateral regulation will "illegitimately affect the regulatory efforts of other nations," and, third, that foreign nationals may not have notice of local regulation that will be applied to them. *Id.* at 1204.

Although the federal government is certainly free to take the position that federal content regulation applies anywhere in the world, there are limits on the ability of federal courts to enforce federal content regulation. In order to subject a particular content provider to an enforcement action based on a federal ratings statute, two conditions must be met: the law must be somehow be applicable to the content provider's conduct, and the content provider must be subject to the jurisdiction of U.S. courts.<sup>265</sup>

International law limits the applicability of one nation's law to the citizens of another. In order for a nation's law to apply to a foreign citizen not present in the nation's territory, the acts of the foreign citizen must, at the least, have a local effect on the citizens of the nation seeking to impose its law.<sup>266</sup> Even then the extension of the law to those acts must be reasonable.<sup>267</sup> Because Internet content providers cannot effectively limit the geographic reach of their content, foreign content providers' failure to rate would, under a mandatory regime, have a "local effect" on American content consumers: the delivery of unrated content. But under a voluntary regime, the failure to rate content has no legal significance, so failure to rate does not have a local effect in the United States. Without a local effect in the United States, the federal ratings statute would be inapplicable to foreign content providers.

Similarly, the Constitution limits the jurisdictional reach of federal and State courts. United States courts have consistently refused to find personal jurisdiction over foreign Internet participants who do nothing more than publish content on the Internet.<sup>268</sup> Rather, content providers must do something more to specifically direct their content to Americans in order to subject themselves to the power of U.S. courts. Only those content providers who direct their content to Americans have the potential for general liability under U.S. law, and those content providers who do direct their content to

---

265. See Goldsmith, *Against Cyberanarchy*, *supra* note 263, at 1216.

266. See *Hartford Fire Ins. Co v. California*, 509 U.S. 764, 781 (1993); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402(1)(c), 403 (1987).

267. See *id.*

268. See, e.g., *Blackburn v. Walker Oriental Rug Galleries, Inc.*, 999 F. Supp. 636, 638-39 (E.D. Pa. 1998); Goldsmith, *Against Cyberanarchy*, *supra* note 263, at 1217-18 & n.77-79 (collecting cases).

Americans cannot reasonably complain that they are unfairly subjected to U.S. laws.<sup>269</sup>

Voluntary regimes go one step further, providing an additional safeguard against unfair extraterritorial application of U.S. ratings law: the elements of a ratings offense. Because of the nature of voluntary regimes, a foreign content provider who subjects himself to U.S. courts by means of any act other than using the U.S. ratings system<sup>270</sup> still has nothing to fear. Under a voluntary rating regime, rating one's content is a prerequisite to liability. Voluntary regimes cannot punish the failure to rate; punishing the failure to rate is what converts a voluntary regime into a mandatory one.<sup>271</sup> Under a voluntary regime, only *mis*-rating can be a violation, so foreigners who choose not to rate their content using the U.S. vocabulary have no fear of prosecution because it would be logically impossible for them to violate the ratings law.<sup>272</sup>

## 2. Facilitating Justified Extraterritorial Application of Federal Internet Content Regulation

In exactly the same way that voluntariness prevents impermissible application of United States content regulation to foreign content providers, it also *justifies* the extraterritorial application of a federal content-regulation regime. Under the principles described above, a foreign content provider who rates his content using the U.S. vocabulary will be found—under both international and federal constitutional law—to be within

---

269. Similarly, voluntariness resolves concerns about whether foreign content providers have notice of U.S. ratings laws. Placement by the content provider of a U.S. rating on particular content would alone constitute sufficient proof that the content provider is aware of the U.S. ratings statute, else how would they know which ratings tags to apply? Surely such behavior would satisfy whatever notice requirement actually exists in federal and international law. *See generally* Goldsmith, *Against Cyberanarchy*, *supra* note 263, at 1243-44.

270. For example, the content provider might be temporarily physically present in the United States. *See* *Burnham v. Superior Court*, 495 U.S. 604, 610-22 (1990).

271. This aspect of voluntary regimes distinguishes them not only from mandatory regimes, but also from publication restrictions. In order to be effective, publication restrictions must restrict the publication of *all* offending content on the Internet, setting the stage for an unprecedented extraterritorial application of federal law.

272. Voluntariness also helps to avoid potential friction with the governments of foreign nations. If content providers must “opt-in” to the U.S. ratings regime, other nations are less likely to complain that their citizens are being unwillingly subjected to the power of a foreign sovereign.

the reach of American courts enforcing the federal ratings statute. If the foreign content provider does apply a U.S. rating, application of the federal ratings statute can hardly be called unfair. The only purpose for rating one's content with U.S. ratings would be to direct that content to Americans. Thus, rating content with the U.S. ratings vocabulary and publishing it on the Internet would constitute "directing" that content to American viewers, and enforcement authorities would not be required to show any *other* conduct for a court to both apply the U.S. ratings law to, and find personal jurisdiction over, the foreign mis-rater.<sup>273</sup> A voluntary regime, by resolving the fairness concerns that traditionally visit extraterritorial enforcement of national law, also makes the law more likely to be applied extraterritorially when appropriate, and therefore more effective at shielding content consumers from undesired mature content.<sup>274</sup>

### CONCLUSION

The Internet community has consistently shunned government attempts to regulate content on the Internet, and with good reason. The regulation that the government has proposed for the Internet would destroy much of the Internet's value, not just by limiting the freedom of Internet participants to express themselves, but also by trying to impose a particular regulating structure on the entire Internet. The Internet's flexibility makes it a laboratory for new forms of communication, allowing previously unimagined exercises in

---

273. The same is true for other laws. If particular content is objectionable for some reason beyond its level of maturity (for example, if it is fraudulent), then the presence of a U.S. rating on that content would lend weight to the argument that the (fraudulent) content is directed to U.S. content consumers. The presence of a U.S. rating on Internet content should make U.S. courts more willing both to exercise personal jurisdiction over the content provider and to apply other substantive U.S. laws, such as prohibitions against fraud.

274. Ironically, to the extent the United States were successful in "exporting" its ratings regime to other countries, as discussed in Part III.E, the existence of U.S.-designated ratings on Internet content would lose its force as a reason for finding personal jurisdiction over a foreigner. If the U.S. regime were to become the *de facto* world standard, or possibly the *de jure* standard through adoption by foreign governments, then it would be increasingly likely that content carrying a U.S. rating is nevertheless directed to another country or to the world at large. It is yet another paradox of Internet content regulation that the ability of the U.S. system to rely on voluntariness as a basis for jurisdiction is inversely proportionate to the degree of its acceptance; the more popular the American system becomes, the harder it will be to enforce.

creativity. These regulations would destroy both the Internet's status as a place of free and open discourse and its value as a place that allows its users to redefine how they structure their communications.

But just because the government's previous attempts at Internet content regulation have been misguided does not mean that we should turn away from the government as a source of Internet content regulation. Government, and particularly the United States government, is uniquely situated to serve as both an effective and fair Internet content regulator, but an incomplete view of how government can legitimately regulate Internet content may be keeping us from devising optimal government regulation. The solution to the problems with previous Internet content-regulation proposals, both economically and constitutionally, is to remind ourselves of government's ability to regulate through power-conferring rules. We should free government to adopt a regime of voluntary self-rating as its chosen method for regulating Internet content. Even under a voluntary regime, government can bring the credibility needed to convince content providers to rate their content, while constitutional restrictions on government action serve to protect us from its overreaching. No private content regulator labors under those restrictions, so advocates interested in preserving the free speech values embodied in the First Amendment, would be wise to look to government to provide whatever content regulation it is that Internet users demand. If we are successful in developing a national regime of content regulation that is consistent with the First Amendment, we might even go beyond defensively preserving First Amendment values; we could use the Internet to spread the First Amendment's protections to the rest of the world.



