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Filters and the First Amendment

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Filters and the First Amendment

R. Polk Wagner†

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Within seconds of sitting down at the computer terminal in his father’s study, ten-year-old Simon is connected to the Internet. A vast world of learning opens up before him—never before in history has such a powerful network of information been available to so many for so little. But Simon isn’t interested in worlds of information: he’s on a mission. He plays a few games on his favorite gaming web site, checks up on friends in their virtual hangout, and updates some entries on his own web page—but not before finishing his research for a report on Abraham Lincoln due next week. Finally, when it’s time for bed, Simon reluctantly ends his travels for the day, logging off with a click. His mother, Susan, watches Simon climb the stairs to get ready for bed, thinking about how the new software she had installed on the family computer two months ago has changed little Simon’s life. No longer were Susan and her husband forced to be constantly at Simon’s side while he surfed the net—he was now free to explore on his own, safe and secure. As she started up the stairs to tuck Simon into his bed, Susan wondered at how the Internet, once a place of danger and confusion, had been tamed: “Amazing . . . to think that filters changed everything.”

Those of us who are advocates of the Internet had better face up to it: the Internet has an image problem. *Time* magazine devotes a special issue to “cyberporn.”¹ The President describes “horror stories about the inappropriate material for children that can be found on the Internet,” and the fact that “children can be victimized over the Internet.”² Over 1,150 stories in major newspapers this year alone contain the words

1. See, e.g., Philip Elmer-Dewitt, *On a Screen Near You: It’s Popular, Pervasive and Surprisingly Perverse*, According to the First Survey of Online Erotica, *TIME*, July 3, 1995, at 38.

2. President’s Remarks Announcing Steps to Make the Internet Family-Friendly, 33 *WEEKLY COMP. PRES. DOC.* 1077 (July 16, 1997) [hereinafter *President’s Remarks*].

“Internet” and “porn.”³ In some ways, the Supreme Court’s decisive holding in *Reno v. ACLU* that there was “no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium”⁴ only intensified the problem, bringing new attention to the difficulties of regulating—or even monitoring—this diverse new medium.

Therefore, it should come as no surprise that the response to *Reno v. ACLU* and the burgeoning content of the Internet has been largely in the direction of *technological* solutions: especially towards filtering and blocking software. These systems hold out the promise of easy, effective, and flexible content selection—Simon’s story represents the ideal of filters’ supporters—without government intervention. *PICS: Internet Access Controls Without Censorship* is the title that developers of one growing filtering system gave their manifesto.⁵

As with any “solution” to a difficult problem, however, filtering technologies are not uncontroversial. They have been variously described as “the devil”⁶ and “the most effective global censorship technology ever designed.”⁷ They have been roundly criticized as being ineffective, both overbroad and underinclusive. And probably unconstitutional to boot.⁸

It is into this thicket that this article proposes to go. Filtering technologies—friend or foe—are here to stay; we had better learn how to deal with them. But rather than focus on the legal/policy choices inherent in the selection of any regulatory system—legal or extra-legal—I attempt here to sketch a way of looking at the issues raised by filtering technologies more directly. Instead of extrapolating the technological and economic development of filters and looking back skeptically, I seek to understand how the filters of *today and the foreseeable future* fit into the First Amendment of *today and the foreseeable future*. There are two requirements for this. The first is a

3. Search of LEXIS, News library, Majpap File (May 10, 1998).

4. 117 S. Ct. 2329, 2344 (1997).

5. Paul Resnik & James Miller, *PICS: Internet Access Controls Without Censorship*, 10 COMM. ACM, Oct. 1996, at 87.

6. See Lawrence Lessig, *Tyranny in the Infrastructure*, WIRED 5.07, July 1997, at 96, 96.

7. Simson Garfinkel, *Good Clean PICS: The Most Effective Censorship Technology the Net Has Ever Seen May Already Be Installed on Your Desktop*, HOTWIRED (Feb. 5, 1997) <<http://www.hotwired.com/packet/garfinkel/97/05/index2a.html>>.

8. See generally Lawrence Lessig, *What Things Regulate Speech: CDA 2.0 vs. Filtering*, 38 JURIMETRICS J. 629 (1998).

realistic, reasonably detailed, and precise understanding of the technology. Just as one would not expect to discuss the Constitution without knowing some intricacies of its operations, any discussion of filters and the First Amendment must be grounded firmly in technological understanding. The second prerequisite is a vigorous attempt to apply current First Amendment doctrine to the issues, noting where changes in the technology or the law will reach different results, but never straying too far from present understanding.

I approach this task from an operational perspective, attempting to measure the limits on government uses of filters imposed by the First Amendment. My conclusion—that the present technology and the current state of the doctrine allow the government considerable latitude in this area—will not be heartening to those who seek to send filters the way of the Communications Decency Act (CDA). But neither should it be comforting to those who would seek increased government involvement in Internet regulation: a recurrent theme in my analysis is the significance of private filtering choices unencumbered by government regulation. In the end, the importance of the ever-changing relationship between the technology, the law, the market, and the participants is the dominant factor; evolution of any one factor will likely yield different results into the future. A solid frame of reference, however, will become ever more important.

Part I of this article details the essential features of today's Internet filters. In particular, I make a distinction between a database system of filters, reliant on a central compilation of ratings and content identifiers, and an embedded system, which focuses on the self-rating task of potential speaker-producers. The embedded systems, primarily the Platform for Internet Content Selection (PICS), offer the hope of a rating system that is neither under- nor over-inclusive and that is inexpensive, easy to administer, and potentially self-enforcing via users' choices to opt-out of viewing unrated pages. Part II then looks at the potential for filters as regulation generally, noting in particular the economic and coordination problems that are likely to prevent the spontaneous widespread adoption of a PICS rating system without governmental assistance.

The essay then turns its attention to approaches the government might take when seeking to support filter-based content regulation. Part III explores direct government filtering.

This approach is likely to be found to be an unconstitutional content-based restriction on speech, in large measure because, under present filtering technology, the “fit” between the ends and the means would be very poor since the current state of the technology in filters is simply not precise enough. Having determined that direct filtering is unlikely to be successful, Part IV discusses indirect government approaches. First, the government could require labeling of Internet content but not impose any filters, which would simply enable end users to make the content selection choices. Under the current doctrine, this is likely to be a constitutional approach: attacks on it under a compelled speech, interference with architecture, or compelled association theory all fall short of invalidating a cleverly-drawn government statute. A second indirect approach is government use of a variety of techniques to influence the market in a way that might support the creation and support of a PICS rating system. Although some of these activities might raise unconstitutional conditions issues, they are likely to be upheld by the Supreme Court. Part IV ends with a brief look at the role of the state action and unconstitutional conditions doctrine, using the possible analogy to the V-Chip from the broadcast context as an example.

I. AN INTRODUCTION TO FILTERING & BLOCKING TECHNOLOGY

It is often pointed out, particularly in the context of the Internet, that technology can be a far more pervasive and effective constraint on behavior than the law.⁹ Properly installed and configured, technological “code” offers a scheme of constraints on Internet content that are untiring, perfectly consistent, and allows a degree of precision and customization that statutory approaches and even licensing schemes cannot hope to match.¹⁰ Thus the panacea of a technological solution to the problem of content regulation in cyberspace has become increasingly attractive.¹¹ But it is important to first recognize

9. Lawrence Lessig, in particular, has persuasively made this point. *See id.*

10. *See, e.g., Reno v. ACLU*, 117 S. Ct. 2329, 2353-54 (1997) (O'Connor, J., dissenting).

11. *See, e.g.,* The White House, Office of the Press Secretary, *Internet Online Summit: Focus on Children, Mission Statement* (last modified Nov. 19, 1997) <<http://www.kidsonline.org/mission/>> (encouraging technological “user empowerment tools” to shield children from inappropriate material).

that the true problem that content-filtering seeks to solve is informational, not technological.

A. THE MODES OF FILTERING

Whatever you call it—content selection, content regulation, editing, or censorship—the tricky part is the information. The objective is to prevent certain materials or content from arriving in places where they are not wanted. Mom or Dad wants to keep smut out of the kids' computer. The boss wants to keep an orderly working environment. And perhaps the government censor wants to keep antigovernment ideas from taking root. Although one may disagree with the particular applications, the constituent parts of any solution to these problems are the same: *control* over the means of distribution, and *information* about the content itself. With perfect control over the distribution and perfect information, the solution is achieved.

This solution set is not unique to Internet content. Pre-announced guides (information) and channel-changers (control) are used to "regulate" what appears on our televisions. Given prior knowledge of what junk mail would arrive in this afternoon's mail, one could confidently "filter" out the unwanted material—or have someone else do it.¹²

Among the moving parts here—information and control—it seems clear that society has a considerably stronger grip on the means of controlling distribution than on the information required to effectively filter. Television guides are not perfect, and today's mail is hard to predict. Therefore, a set of second-best techniques have developed: channel surfing (lingering on a channel only long enough to ascertain its content) and "envelope guessing" (discarding mail based on a quick glance at the envelope) are each attempts to resolve the information problem.

Information is what the new technology of filters really provides. Conceptually, the filtering of content in cyberspace first assumes that the content is rated according to some known set of criteria—providing information about the content. Second, it presumes that someone—often the end user—has set *options* (i.e., control) specifying the type of content that is al-

12. See, e.g., *Rowan v. United States Post Office*, 397 U.S. 728, 740 (1970) (allowing the Post Office to implement mail patron requests to block mail based on sender address).

lowable, and that which is not. The operating mechanism of the filtering system compares the rating applied to the content with the options applicable to the user. Where the rating exceeds in some way the choices—perhaps by being too “adult” in nature—the content is “blocked,” usually by not being displayed on the user’s screen or downloaded to the user’s computer.

Obviously, the critical points in this framework for our purposes are the ratings and the setting of options: this is where the technology accepts human inputs. The comparison between the rating and the options is merely an “administrative” function performed by technology; the speed and accuracy of the system make the widespread filtering feasible, but it is entirely controlled by the rating and option inputs.

Broadly speaking, there are two forms of ratings systems. The first are *database* systems, which associate ratings with particular content and store the rating-content information.¹³ When a user requests a particular piece of content, her system will contact the database, which will send back the corresponding rating. In contrast, an *embedded* ratings system uses labels or tags within the content itself to transmit the corresponding rating.¹⁴ The primary difference between the two systems is *who* affixes the rating to a particular piece of content. In an embedded system, ratings are typically assigned and entered by the content’s creator, while in a database system the ratings for a vast array of content are created and stored by a third party—that is, neither the end user nor creator.¹⁵ The burgeoning commercial market for ratings products

13. Cyber Patrol, SurfWatch, CyberSitter, and X-Stop are all examples of database-driven filtering software products. See, e.g., *Cyber Patrol* (visited Oct. 16, 1998) <<http://www.cyberpatrol.com>>; *Surfwatch* (visited Oct. 16, 1998) <<http://www.surfwatch.com>>.

14. The Platform for Internet Content Selection (PICS) is the best-known example of an embedded system. See, e.g., Paul Resnik, *Filtering Information on the Internet*, SCI. AM., Mar. 1997, at 62.

15. This is primarily because the huge volume of content to be rated and the difficulty of keeping the database system current virtually mandates spreading the costs. See *Study: Search Engines Fall Short*, CNET NEWS.COM (Apr. 2, 1998) <<http://news.com/News/Item/0,4,20728,00.html>> (finding that even search engines index only a fraction of the web). Not all database systems are run by third parties, however. The University of Michigan is demonstrating a database ratings system that will use ratings assigned by the “community” using the ratings system. See *PICS Application Incubator* (visited Oct. 16, 1998) <<http://krabappel.si.umich.edu/incubator/>> (“Such a

has fueled the growth of these third-party systems, most of which sell access to a database, and even subscriptions to updates.¹⁶

Problems with these database systems are well documented.¹⁷ First, they are wildly overbroad and inaccurate, often blocking unexpected and useful content.¹⁸ Second, they face an almost impossible task of keeping up with the tremendous volume and growth of the content on the Internet.¹⁹ And

system uses embedded labels in combination with externally created ratings.”).

16. For example, The Learning Company offers Cyber Patrol 4.0, a parental control software product, for \$29.95. See *Cyber Patrol Fact Sheet* (visited Oct. 16, 1998) <<http://www.cyberpatrol.com/fact.htm>>. Cyber Patrol uses a CyberNOT and CyberYES list to allow users the option of blocking the content on the CyberNOT list or limiting content to that on the CyberYES list. See *id.* The lists are updated regularly by a “team of professionals . . . including parents and teachers.” *Id.* Subscriptions to the updating service are an extra charge. See *id.*

Of course, the ratings need not be assigned by humans. NetNanny is software that scans the content of materials before it is displayed on a user’s screen. If the content matches words or phrases defined by the user to be disallowed, then the content will not be displayed. See *Netnanny FAQ* (visited Dec. 10, 1998) <<http://www.netnanny.com/support/faq.htm>>.

17. Declan B. McCullagh & Brock N. Meeks, *Keys to the Kingdom*, CYBERWIRE DISPATCH (July 3, 1996) <<http://www.cyberwerks.com/cyberwire/cwd/cwd.96.07.03.html>>; Peacefire: Youth Alliance Against Censorship, *Why Peacefire Opposes Blocking Software* (visited Oct. 25, 1998) <<http://www.peacefire.org>> [hereinafter Peacefire]; Electronic Privacy Information Center, *Faulty Filters: How Content Filters Block Access to Kid-Friendly Information on the Internet* (visited Jan. 5, 1999) <<http://www2.epic.org/reports/filter-report.html>>.

18. For example, recent reports by the Censorware Project and Peacefire.org note that the highest-rated filtering software product, Cyber Patrol, blocks the web sites of Planned Parenthood, Envirolink (an environmental clearinghouse), the AIDS Authority, the MIT Project on Mathematics and Computation, the University of Arizona, and the U.S. Army Corps of Engineers Construction Engineering Research Laboratories. See Peacefire, *supra* note 17; The Censorware Project, *Blacklisted by Cyber Patrol: From Ada to Yoyo* (visited Dec. 23, 1997) <<http://www.spectacle.org/cwp/ada-yoyo.html>>; see generally Jonathan Weinberg, *Rating the Net*, 19 HASTINGS COMM. & ENT. L.J. 453 (1997).

19. A recent study of search engines concluded that (as of early 1998) there are more than 320 million individual pages on the web alone. *Study: Search Engines Fall Short*, *supra* note 15. By some accounts, the number of pages on the web has been doubling every three to six months since 1993. See Matthew Gray, *Web Growth Summary* (visited Oct. 16, 1998) <<http://www.mit.edu/people/mkgray/net/web-growth-summary.html>>.

The database filtering systems could respond to this volume by assigning ratings more generically—by rating an entire domain or host rather than individual web pages, for example. Of course, this only exacerbates the inaccuracy of the ratings. For example, Cyber Patrol has listed all pages at

third, it is very difficult for the user to know what is being blocked and why, because the creators of these systems consider the databases to be proprietary information, and their contents are subject to the judgment of the people involved.²⁰ Database filtering systems are a coarse tool, and, while they remain the most feasible technology available today, the more refined embedded systems hold the promise of solving some of the most persistent problems with rating systems.

B. EMBEDDED SYSTEMS: THE PLATFORM FOR INTERNET CONTENT SELECTION (PICS)

Conceptually, an embedded ratings system seeks to solve the major problems of the database systems by shifting the responsibility of rating content to the producer and transmitting the rating with the content itself. Thus, an embedded system wholly avoids the volume problem fundamental to the database systems. Further, by "labeling" or "tagging" each page or

"members.tripod.com" under the categories of "violence," "nudity," "sexual acts," and "satanic/cult information." See The Censorware Project, *supra* note 18. That host is home to 1.4 million web pages, and while some of them probably do have offensive material, most probably do not, and are blocked by the program. See *id.*

20. Many of the filtering software programs denote specific criteria by which they rate pages. For example, Cyber Patrol has a list of twelve categories of rated material: violence/profanity, partial nudity, full nudity, sexual acts, gross depictions, intolerance, satanic/cult, drugs/drug culture, militant/extremist, sex education, questionable behavior or gambling, and alcohol and tobacco. See Cyber Patrol, *CyberNOT List Criteria* (visited Oct. 16, 1998) <http://www.cyberpatrol.com/cp_list.htm>. Users of the software can choose to block any or all of these rated categories.

The story of Solid Oak Software's CyberSitter is an enlightening example of the ways that these databases can be abused. After Brock Meeks and Declan McCullagh wrote *Keys to the Kingdom*, a *Cyberwire Dispatch* story exposing the overbreadth of filtering software (including the fact that CyberSitter blocked the National Organization for Women for "sexual content"), CyberSitter blocked the *Cyberwire Dispatch* site. The software still blocks the site for Peacefire, a young persons' organization against online censorship that contains material critical of filtering software, including CyberSitter. See McCullagh & Meeks, *supra* note 17; Peacefire, *supra* note 17. Solid Oak Software has threatened to block all 2500 web sites hosted by Peacefire's provider unless the provider removed the Peacefire site. Rebecca Vessel, *CyberSitter Goes After Teen*, WIRED NEWS (Dec. 9, 1996) <<http://www.wired.com.news/story/901.html>>. In 1997, it was revealed that CyberSitter's installation software scanned the user's hard drive to determine whether the user had visited the Peacefire web site, and would not install the software if it had. See Brian McWilliams, *CYBERSITTER Filters Out Privacy, Says Anticensorship Group*, PC WORLD NEWSRADIO (July 2, 1997) <<http://www.pcworld.com/pwtoday/article/0,1510,5006,00.html>>.

other element of content, the embedded system is neither under- nor overbroad.²¹ And because producers rate their own content as they create it, the rating system is comprehensive, and the third-party effects noted above are not present.

The Platform for Internet Content Selection (PICS) is a standard for embedding rating labels within Internet content developed by Paul Resnik of AT&T Research and James Miller of MIT.²² PICS itself specifies little more than the syntax and protocols used to label content and transmit the labels; it does not itself specify a ratings system.²³ The creators of PICS intend to enable other groups (or even individuals) to develop their own rating schemes, using PICS as the underlying standard to ensure interoperability.²⁴ Thus, for example, any web browser that is PICS-enabled would be able to use any of the PICS-compatible ratings systems. A market might then develop for such ratings systems, allowing a diversity of ratings systems as well as placing the choices regarding rating and viewing content in the hands of the producers and users, respectively. As Resnik and Miller note:

Around the world, governments are considering restrictions on on-line content. Since children differ, contexts of use differ, and values differ, blanket restrictions on distribution can never meet everyone's needs. Selection software can meet diverse needs, by blocking reception, and labels are the raw materials for implementing context-specific selection criteria. The availability of large quantities of labels will also lead to new sorting, searching, filtering, and organizing tools that help users surf the Internet more efficiently.²⁵

In many ways, the promises of PICS have been borne out. A market of sorts has developed for the PICS-compatible ratings system; most of the major Internet-related companies have announced support for PICS. Politicians and pundits alike have endorsed the PICS approach to content regulation.²⁶ But PICS is not without its problems, both systemic and perceptual.

21. Unless, of course, the producer inaccurately classifies the content.

22. See Resnik & Miller, *supra* note 5.

23. See *id.* at 87.

24. See *id.* at 88.

25. *Id.* at 93.

26. See, e.g., *A Family Friendly Internet* (visited Oct. 16, 1998) <<http://www.whitehouse.gov/WH/New/Ratings/>> ("On Wednesday, July 16, President Clinton and Vice President Gore announced a strategy for making the Internet 'family friendly.'").

First, the enabling technology of PICS allows a whole new dimension to social interaction: labeling that is standardized and perfectly predictive, allowing labels to be ubiquitous. Labels have power, and PICS makes this power accessible. Not only can one be the town crier, one can be the town censor as well. Indeed, there is nothing that limits the scope of ratings based on PICS, or who can implement them. While we often think of ratings in terms of "adult" content, the PICS system could just as effectively label content for subjective attributes like "quality" or even label based on politics—such as "republican" or "democrat," or "mainstream" or "radical." This author even created a PICS rating system that allows rating and selection based on the "stupidity" quotient of a particular web page.²⁷ A corporation, a government, or an individual could create a ratings system that labeled content that was critical or embarrassing. Don't like op-eds written by Rush Limbaugh? Add a tag to your PICS system and block him out from your screen (and from others who agree with you). Really enjoy classical music? Then search for content with the classical music label and save yourself some time. The possibilities are limited only by social creativity. *At least in theory.*

C. COORDINATION AND COOPERATION UNDER PICS

Here's the catch: PICS requires the cooperation of the producer of the content. If the population of web page producers fail to see the wisdom in rating according to a particular system, or if they don't know about it, they will not embed the system's label, and the rating system will not cover their pages. Similarly, if a producer misrates content, the rating system will not be able to correct for it; you will get Rush Limbaugh when you expected him to be blocked.

Some implementations of PICS take a step at addressing this problem by allowing the user to choose the default response to an unrated page. For example, version 4.0 of Microsoft's Internet Explorer allows the user to check a box to choose whether unrated pages can be seen.²⁸ The implied threat of opt-out by users will, in theory at least, encourage many commercial web sites to rate their pages according to the most

27. Through a very scientific observation process, I assure you.

28. See *Recreational Software Advisory Council on the Internet* (visited Oct. 16, 1998) <http://www.rsac.org/fra_content.asp?onIndex=21> (instructing parents how to activate the filter). The factory default setting is to allow unrated sites to be seen.

popular rating services.²⁹ One can imagine that if PICS gains a powerful following among the public, the pressure on producers to label content will only increase.³⁰

For now, however, PICS faces a complex collective action problem. The incentives to label content only gain meaning as more people utilize PICS in the opt-out sort of way. But until more content is labeled, most users will be loath to opt-out of unrated content for fear of missing something important.³¹ Although the "costs" to a producer of rating content according to any particular ratings service are quite low—typically consisting of placing a single line in the HTML code of the page—many producers may have political or other reasons to avoid labeling.

Another important aspect of the PICS labeling system is that just as it is neutral regarding the substance of the ratings applied, the technology is neutral towards the *location* where the filtering is achieved. Resnik and Miller conceive the filtering to take place on the end user's computer, allowing a high degree of individual choice and customization.³² But there is no particular reason that the filtering could not take place at some other level, such as at the user's Internet Service Provider (ISP), or the regional network access point (NAP). In fact, any nodes between the user and the content server are potential filter-points, and the user may not even know about it. Corporations or universities could filter their connection to the wider Internet,³³ keeping internal users from accessing materials deemed inappropriate. ISPs could offer "upstream" PICS filtering as a benefit to families; no need for parents to learn, install, and configure any software. And, of course, govern-

29. Microsoft rates their pages according to the Recreational Software Advisory Council (RSACi) system. See *msn.com* (visited Dec. 10, 1998) <<http://home.microsoft.com/>>.

30. I suspect that this pressure will not be limited to commercial producers, but will extend to anyone who wishes to achieve the largest possible audience size. In order to "raise your voice" in cyberspace, it may become necessary to label it.

31. For example, Yahoo.com, the second most popular site on the net, is presently unrated, as are Netscape.com, the third most popular site, the New York Times, and others. See Media Metrix, *Top New Media Results* (visited March 1998) <http://www.npd.com/interact_mmmnewmedia398.htm> (ranking the popularity of web sites among users connecting from their homes).

32. See Resnik & Miller, *supra* note 5, at 91.

33. Stanford University, for example, routes most Internet traffic through a computer named "sunset-gateway.stanford.edu," an obvious place for a filter. Most corporations have similar set-ups.

ments could filter content entering their territory to the extent they controlled the points of entry.³⁴ Placing labels on content, although theoretically to facilitate individual selection of ratings, or what Justice O'Connor called "user-based zoning,"³⁵ would be an incredibly effective tool for censorship.³⁶

D. PICS-ENABLED RATINGS SYSTEMS: LABELING IN ACTION

The PICS-enabled ratings systems themselves bear some consideration as well. One argument made in support of PICS is that it will facilitate the growth of a marketplace of ratings systems. Of course, it is vaguely unsettling to speak of content blocking in this way; after all, this is Brandeis turned on his head: a marketplace for anti-ideas, if you will.³⁷ Nonetheless, it is a powerful argument: the interoperability and ease-of-use of the PICS-enabled systems will greatly reduce consumer "lock-in," making the market for such systems more robust, and creating—in theory at least—a diversity of approaches to the rating and labeling issue.

In practice, it is difficult to determine whether the market for anti-ideas is functioning smoothly. As of early summer 1998, it appears that there are six self-rating systems developed and several other third-party rating systems based on PICS.³⁸ By far the largest of these is sponsored by the Recreational Software Advisory Council on the Internet (RSACi).³⁹ In

34. See Lessig, *supra* note 6, at 96. Control over access points is not a trivial matter. New interconnections are springing up all the time; democratic governments at least would be hard pressed to keep up with this growth.

35. *Reno v. ACLU*, 117 S. Ct. 2329, 2354 (1997) (O'Connor, J., dissenting).

36. See Garfinkel, *supra* note 7 ("Resnick and Miller have done a great job designing a framework for censorship. I don't think I could have done it better myself").

37. See *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time . . . to avert the evil [flowing from speech] by the process of education, the remedy to be applied is more free speech, not enforced silence."), *overruled in part by Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

38. See Paul Resnick, *Platform for Internet Content Selection (PICS)* (last modified Jan. 3, 1998) <<http://www.w3.org/PICS/>>. PICS allows the embedded code to refer to another Internet site for the label rather than containing the label itself. See *id.* This essentially turns the PICS system into a database system, as the external labels are typically assigned by a third party. SurfWatch, Cyber Patrol, and NetShepherd are all examples of PICS-enabled third-party rating systems. See *id.*

39. See *About RSACi* (visited Oct. 18, 1998) <http://www.rsac.org/fra_Content.asp?onIndex=1>.

December 1997, RSACi claimed to have 50,000 pages of content rated according to its system⁴⁰ and comes pre-installed in all versions of Microsoft's Internet Explorer.⁴¹

Rating one's web site (or web page) according to the RSACi system is free, and requires two basic steps: (1) answering a series of questions about the site, including contact information and content description, at the RSACi home page; and (2) obtaining the snippet of rating code and pasting it into the HTML code of the web page at issue.⁴² Significantly, RSACi, by requiring the prospective rater to electronically affirm an agreement, retains "the right to audit and inspect the Rated Web Site to confirm that Applicant's use of the Assigned Rating meets the established standards" of use and specifically notes the possibility of "corrective labeling."⁴³

The RSACi rating comprises an assignment of "levels" within four categories: nudity, sex, language, and violence.⁴⁴ Each category allows five levels (numbered zero to four), and each level has a defined meaning.⁴⁵ For example, in the language category, level four is defined as "[c]rude, vulgar language or extreme hate speech," level three as "strong language or hate speech," level two as "[m]oderate expletives or profanity," level one as "[m]ild expletives," and level zero as "[n]one of the above."⁴⁶ After the user completes the questionnaire—and

40. See *Recreational Software Advisory Council Rates Over 50,000 Web Sites Free: Voluntary System Leads the Industry in Safeguarding the Internet for Children* (visited Dec. 1, 1997) <http://www.rsac.org/fra_Content.asp?onIndex=73>.

41. See *Recreational Software Advisory Council on the Internet*, *supra* note 28.

42. See *Parents—How to Use RSACi* (visited Oct. 18, 1998) <http://www.rsac.org/fra_content.asp>.

43. See *RSACi Terms & Conditions* (visited Oct. 18, 1998) <<http://www.rsac.org/content/register/terms.html>>. This at least raises the possibility that RSACi will supplant a producer's judgment for its own, although I am unaware of any such circumstances where this has arisen.

44. See *About RSACi*, *supra* note 39.

45. See *id.*

46. *Id.* The terms used to describe the categories are further defined. Thus, "mild expletives" are further described as: "The words hell and damn, ass and horse's ass, BUT NOT asshole, assface, asswipe; butthead and buttface BUT NOT butthole and buttwipe." *Definitions for RSACi Language Questions* (visited Oct. 18, 1998) <<http://www.rsac.org/content/register/def/language.html>>. The system's definition of "innocent kissing" (suitable for a zero rating on the sex scale) is:

Any portrayal of humans or human-like creatures which a reasonable person would consider as just kissing on lips (without touching of

affirms the contract—she is presented with a line of computer code which can be pasted into the web page. For example, the RSACi code for my web page is:

```
<META http-equiv="PICS-Label" content="(PICS-1.1 "http://www.rsac.org/ratingsv01.html" 1 gen true comment "RSACi North America Server" on "1998.04.29T11:55-0800" r (n 0 s 0 v 0 1 0))">
```

The “rating label” is designated by the numbers corresponding with the category letters. Therefore, in the example above, the nudity level is zero, the sex level is zero, the violence level is zero, and the language level is zero. In contrast, the *Playboy* homepage’s PICS label is:

```
<META http-equiv="PICS-Label" content="(PICS-1.0 "http://www.rsac.org/ratingsv01.html" 1 gen true comment "RSACi North America Server" by "rogerb@playboy.com" for "http://www.playboy.com" on "1996.04.04T08:15-0500" r (n 4 s 3 v 0 1 4))">47
```

Thus, *Playboy* has self-rated its site as having “[f]rontal nudity,” “[n]on-explicit sexual acts,” no violence, and “[c]rude, vulgar language or extreme hate speech.”⁴⁸ Browsers with options set at lower levels in any one of the four categories would not load the *Playboy* web site but would be able to see my site.

II. FILTERS AS REGULATION: COORDINATION AND THE NETWORK

The conceptual attractiveness of Internet content filters and their limitations prompts discussion regarding the scope of governmental involvement in their use. In their idealized form, technological filters hold out the promise of a dynamic, efficient, and effective means of screening content from minors and unconsenting adults while retaining large measures of individual autonomy and choice.

But in late 1998, it seems unlikely that an idealized PICS system will spring up soon without at least some form of government intervention. A relatively small number of pages are

tongues), head, shoulder, hands or arms, but not any other areas including but not limited to neck, breasts, torso, or legs. Innocent kissing shows affection and/or love, but creates no reasonable perception of stronger sexual activity.

Definitions for RSACi Sex Questions (visited Oct. 18, 1998) <<http://www.rsac.org/content/register/def/sex.html>>.

47. See *Playboy Online* (visited Oct. 21, 1998) <<http://www.playboy.com/>>. While the PICS ratings are normally invisible to the user, anyone can see the ratings code (if any) of any page by selecting the “view source” function of the web browser.

48. See *About RSACi*, *supra* note 39.

actually rated according to a PICS rating scheme, and the largest Internet browser manufacturer has not yet released a PICS-enabled version of the software.⁴⁹ A PICS rating system is perhaps the classic example of a good with strongly positive network externalities—it is relatively valueless until increasing numbers of people use it, while its value increases rapidly with the number of users.⁵⁰ At the present time, the cost and effort of learning and implementing the PICS systems,⁵¹ albeit quite low, is unlikely to yield satisfactory returns without incentives.

The potential “costs” of easy access for children to pornographic materials, however, are significant. Even beyond the difficult-to-quantify, although not insignificant, social costs of children viewing indecent material, there is the very real perceptual problem caused by a public view of the Internet as the home of little more than what have been described as the “Four Horsemen of the Infocalypse”: pedophiles, terrorists, drug-dealers, and money launderers.⁵² This negative perception could limit the Internet’s growth as a mainstream commercial and communications network, restraining the growth of an emerging sector of the economy.⁵³ Lower growth in the increasingly important Internet industry might raise the spectre of market failure, providing incentives for government intervention. And the politics of the underlying issue is likely to further energize regulation: protecting children is a powerful, bipartisan issue, and the Four Horsemen have few friends in government.

49. *See id.*

50. *See, e.g.,* ROBERT S. PINDYCK & DANIEL L. RUBINFELD, MICRO-ECONOMICS 118-20 (3d ed. 1995) (“The Bandwagon Effect”). The argument, as made above, is that as more users enable the PICS rating systems on their computers (and some percentage of these choose to opt-out of unrated sites), the benefit to the producer of self-rating will increase. As the number of rated sites increase, the value of PICS—to both the user and the producer—increases rapidly, encouraging even more use.

51. This applies to either producer/raters or users/choosers, though the costs are especially low for the users.

52. Wendy Grossman, *Signs of Insecurity in Cyberspace*, DAILY TELEGRAPH (London), July 2, 1998, at 13.

53. The U.S. Government advanced a version of this argument in *Reno v. ACLU*, 117 S. Ct. 2329 (1997), as an additional and “equally significant” interest to that of protecting children. *Id.* at 2351. The Court found the argument to be “singularly unpersuasive” as a countervailing interest to free speech. *Id.*

Therefore, the time seems ripe for additional government involvement in facilitating the screening of Internet content.⁵⁴ The balance of this paper will attempt to describe the permissible scope of the government's activities in relation to the new filtering technologies.

A couple of initial observations may be useful here. First, whatever the government does, it will not have to do very much. PICS, as with all Internet standards, is likely to achieve strong growth due to positive network externalities. The key will be to get it started; a little "push" may be all that is needed to create the self-generating cycle of growth: the ratings become more valuable to users and the creation of ratings becomes more valuable to producers (and vice-versa).

Second, the ratings system chosen in the beginning may stick with us. A ratings system that makes strong initial gains will likely benefit from the network effects to the detriment of competitor systems. Users and producers alike will be attracted to the higher value system, which may be difficult to dislodge once it has gained widespread acceptance. This *path dependence* implies that the "market" for competing rating systems may disappear as PICS itself takes hold, with an initial large player becoming the standard.⁵⁵ Therefore, the implications of government involvement may, as a result of the economics of networks, loom larger than ordinary direct regulation. The stakes seem quite high.

III. DIRECT OR IMPOSED FILTERING

As an initial cut at the issue, the Federal, state, or local government could simply filter Internet content itself or force the filtration of all Internet content by third parties, such as ISPs or backbone carriers.⁵⁶ For example, a state could pass legislation that would enable it to filter and block all material deemed harmful to minors either using PICS or—as is more

54. *Reno v. ACLU* left intact part of the Communications Decency Act, 47 U.S.C. § 223(a) (Supp. 1997), prohibiting the knowing transmission of obscene messages to any recipient under 18 years of age. See *Reno v. ACLU*, 117 S. Ct. at 2340; see also *A Family Friendly Internet*, *supra* note 26 (noting that the decision in *Reno v. ACLU* "did not affect U.S. laws against obscenity, child pornography, and on-line stalking").

55. At this juncture, all indications are that the RSACi is well-positioned in this regard. See Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CAL. L. REV. 479, 597-99 (1998).

56. Backbone carriers are primarily large telecommunications concerns that carry the bulk of Internet traffic between major interconnection points.

likely given the current state of the technology—by installing a database rating system. This statute is almost certainly unconstitutional.

A. THE GENERAL CASE

Either the producer whose content was blocked or the user who was denied access would have standing to challenge the statute. In *Reno v. ACLU*, the Supreme Court appears to have foreclosed any analogy between the Internet and broadcasting where content-based intervention is permissible.⁵⁷ Thus, a filtering-blocking scheme of this sort is a paradigmatic content-based regulation, singling out sexually-related speech, and would be subject to strict scrutiny.⁵⁸ The government would have to show a compelling state interest supporting the filters and that the filters are the least restrictive means to achieve the ends.⁵⁹ While the protection of children from harmful materials has been held by the Court to be significant, even compelling,⁶⁰ the Court has also held that “that interest does not justify an unnecessarily broad suppression of speech addressed to adults.”⁶¹ Because government-imposed filtering would apply regardless of the age of the end user, this law would be held unconstitutional.

Any attempt to limit the filtering and blocking to material deemed “obscene” under the *Miller* test⁶² is unlikely to save the statute. While obscenity is unprotected speech,⁶³ the ratings system itself is probably not precise enough to avoid sweeping in protected speech.⁶⁴

57. 117 S. Ct. at 2343-44.

58. See *id.* at 2329; *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991).

59. See *Simon & Schuster*, 502 U.S. at 118.

60. See *Ginsberg v. New York*, 390 U.S. 629 (1968); *Prince v. Massachusetts*, 321 U.S. 158 (1944).

61. *Reno v. ACLU*, 117 S. Ct. at 2346.

62. See *Miller v. California*, 413 U.S. 15, 24-25 (1973). The *Miller* test looks at three factors to determine whether or not material is obscene. The factors are “(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.” *Id.* (citations omitted).

63. See *Roth v. United States*, 354 U.S. 476 (1957).

64. See *supra* note 18 and accompanying text.

Finally, because the filtering and blocking takes place before the material even reaches the "blocked" users, the law might be characterized as a form of prior restraint, and thus come before the courts with a "heavy presumption against its constitutional validity."⁶⁵ In this regard, the unique procedural aspects of the filtering-blocking system would be significant. The Supreme Court has allowed some prior restraints when the "administration" of the restraints places the burden on the government and allows a rapid appeal to the judiciary.⁶⁶ In this circumstance, however, this "safe harbor" would not apply: although the operative "burdens" of the system are unclear,⁶⁷ the technology does not contemplate an appeal to the judiciary.⁶⁸

B. THE SPECIAL PROBLEM OF LIBRARIES

One context in which the government filtering issue has arisen is public access Internet terminals in public libraries and public school libraries.⁶⁹ In *Mainstream Loudoun v. Board of Trustees*,⁷⁰ one of the first filtering cases to be litigated, the government argued for the constitutionality of a public library's filtering scheme by analogizing it to the selection of library books in *Board of Education v. Pico*.⁷¹ In *Pico*, the Supreme Court held that a school board's removal of several books from a school library was unconstitutional in light of the "right to receive ideas [as] a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and

65. *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam); see also *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).

66. See *Freedman v. Maryland*, 380 U.S. 51, 58-59 (1965).

67. In one sense, the technology places the burden upon the speaker, as she will have to conform the speech to the rubric of the filtering system. However, in *Freedman*, the Court noted the tendency for bureaucratic overreach as the animating purpose behind the burden shifting. See *id.* at 57-58. Here the technology, of course, is perfectly consistent. And finally, the fact that the filtering system is fixed and preexisting means that the speaker has an immobile target at which to aim; she will be able to perfectly tailor her speech to meet the filter.

68. The volume of content and speed at which it gets filtered would themselves be significant impediments to appeal.

69. See, e.g., Jeri Clausing, *In Rejecting Dismissal of Filtering Case, Judge Sets High Standard for Libraries*, N.Y. TIMES (CYBERTIMES) (April 9, 1998) <<http://www.nytimes.com/library/tech/98/04/cyber/articles/09library.html>>.

70. 2 F. Supp. 2d 783 (E.D. Va. 1998).

71. See *Loudoun*, 2 F. Supp. 2d at 793; see also *Board of Educ. v. Pico*, 457 U.S. 853 (1982).

political freedom.⁷² The Court specifically noted, however, that its ruling did not affect "the discretion of a local school board to choose books to add to the libraries of their schools."⁷³ Seizing upon this language, the Loudoun County Library argued that filtering net content was akin to selecting books to add to their collection or to receive through an inter-library loan system and thus, under the Court's precedent, that the "First Amendment does not in any way limit the decisions of a public library on whether to provide access to information on the Internet."⁷⁴ The Federal District Court for the Eastern District of Virginia found this reasoning unpersuasive because of the nature of the Internet as a "single, integrated system"⁷⁵ and because the plaintiffs in *Pico* were schoolchildren.⁷⁶

But this may not be a complete view of the issue. A close look at the doctrine and the technology shows that whether a library may filter and block Internet content will turn upon the "fit" between the state interests and the implementation of the filtering technology itself, although in two different ways.

First, the government can attack the characterization of its use of filtering technology as content-based regulation. In *Renton v. Playtime Theatres*,⁷⁷ the Court noted that where the

72. *Pico*, 457 U.S. at 867.

73. *Id.* at 871.

74. *Loudoun*, 2 F. Supp. 2d at 792.

75. *Id.* at 793 (citation omitted). First Amendment advocates will be wise to avoid hanging too much on this factual distinction. Certainly the Internet can be viewed as an undifferentiated whole—a system of computer networks using the same sets of protocols and allowing ready access to any part of the system from any other. But the net can just as easily be viewed with slightly more granularity, as a "vast library including millions of readily available and indexed publications," according to the Supreme Court. *Reno v. ACLU*, 117 S. Ct. 2329, 2335 (1997). This line of factual argument is also vulnerable to what Justice O'Connor described in her dissent in *Reno v. ACLU* as "gateway" technology—which "construct[s] barriers in cyberspace" between content. *Id.* at 2353-54. The technology of the net is changing so rapidly that viewing it as an undifferentiated whole is likely to become increasingly inapt as filtering and other "gateway" technologies become more widespread and effective.

76. See *Loudoun*, 2 F. Supp. 2d at 795. The Supreme Court has long held that the state has special interests in controlling the operation and curriculum of schools and even in "inculcating fundamental values" in schoolchildren. *Pico*, 457 U.S. at 864; see also *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). The Court has also found that those under the age of majority have less First Amendment rights than adults. See *Ginsberg v. New York*, 390 U.S. 629 (1968).

77. 475 U.S. 41 (1986). The Court in *Renton* found the government interest in zoning regulations to be "substantial," and the zoning itself to be effective. See *id.* at 50-51.

regulation was intended to cure the "secondary effects" of the speech—in that case, to avoid the crime and reduction of property values caused by adult theaters—it was not content-based, but rather a time, place, and manner regulation subject to something like intermediate scrutiny.⁷⁸ In the library context, the government could argue that the imposition of filters was intended to cure the "secondary effects" of the display of indecent material: a reduction in library traffic, the introduction of a "rougher crowd" into the library's patrons, and a general devaluing of the "quality" of the library.⁷⁹ This argument, however, is limited by *Boos v. Barry*, which noted that the reaction of the listener cannot be a secondary effect under *Renton*, implying that the government could not advance the protection of children as a rationale and still fit within a *Renton* analysis.⁸⁰ The *Boos* limitation may be dispositive, since although the Supreme Court has not clarified a means to distinguish a regulation targeted at secondary effects from one that is content-based, courts are likely—as a factual matter—to view efforts to filter Internet content as content-based.⁸¹ But even if the government is able to convince a court that the filtering is legitimately based on a concern about secondary effects, it must still show that the "fit" between filters and the secondary effects is reasonable.⁸²

78. See *id.*

79. In *Renton*, Justice Rehnquist, writing for the Court, noted the prevention of crime, the protection of the city's retail trade, and the quality of urban life as the secondary effects. See *id.* at 48.

80. See *Boos v. Barry*, 485 U.S. 312, 321 (1988) (noting that the desire to prevent "psychological damage" was targeted at the direct effects of the speech, not secondary effects).

81. Professor Tribe argues that laws seen by the courts as related to "communicative impact" will receive strict scrutiny, while those that relate to "non-communicative impact" will not. LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-2, at 790 (2d ed. 1988). Of course, differentiating between the two is not trivial. See John Hart Ely, Comment, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975) (arguing that the distinction between communication-based restrictions and non-communication-based restrictions is difficult to discern). Given the Supreme Court's strong support for the Internet as a medium for free speech, one suspects that courts will look askance at arguments that content regulation on this medium are directed solely at "non-communicative impact." See *Reno v. ACLU*, 117 S. Ct. 2329, 2544 (1997) ("[O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.").

82. Though the required "fit" under the time, place and manner intermediate scrutiny test is not stringent, it is non-zero. The physical "screening-off" of the Internet access computers from other patrons could be viewed as a far

If the *Renton* argument fails, the level of scrutiny applied will then depend upon the breadth of the filters. If the library purports to limit access to only the unprotected categories of obscene or child pornographic materials as defined by *New York v. Ferber* and *Miller*, then it need only show a rational basis for the filtering scheme and a reasonable fit between the interests and the filters.⁸³ If, however, the library extends beyond the truly unprotected categories of speech into indecency or vague "harmful to minors" standards, the filtering will have to be justified by a compelling state interest and be narrowly tailored to that interest.⁸⁴ A state's interest in protecting children from indecent speech is substantial, but *Reno v. ACLU* held that "that interest does not justify an unnecessarily broad suppression of speech addressed to adults."⁸⁵ The Court explained that, "Regardless of the strength of the government's interest in protecting children, the level of discourse . . . simply cannot be limited to that which would be suitable for [children]."⁸⁶ Therefore, it seems that the library would have to bifurcate filtered access to the net between children and adults. Filtering on the adult terminals would be limited to obscenity and child pornography, while filtering on the children's terminals would be somewhat less circumscribed, although probably limited to sexual material of the form discussed in *Ginsberg v. New York*.⁸⁷ In both cases, however, a crucial issue will be the "fit" of the filtering technology; as was noted in the discussions

more effective (and speech-neutral) method for reducing secondary effects in the library.

83. See *New York v. Ferber*, 458 U.S. 747, 765-66 (1982) (holding that obscene material is not entitled to First Amendment protection); *Miller v. California*, 413 U.S. 15, 36 (1973) (holding that restrictions on obscene materials receive rational basis review). Of course, if the filtering technology in fact sweeps broader than the library policy indicates, then courts should read the parameters of the technology as the de facto library policy.

84. See *Reno v. ACLU*, 117 S. Ct. 2329, 2346 (1997) (applying strict scrutiny review to broad restrictions on adult speech designed to protect minors); *Mainstream Loudoun v. Board of Trustees*, 2 F. Supp. 2d. 783, 793 (1988) (statutes restricting speech harmful to minors receive strict scrutiny review).

85. 117 S. Ct. at 2346.

86. *Id.* (quoting *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 74-75 (1983)).

87. 390 U.S. 629, 636 (1968) ("[T]he concept of obscenity or of unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quarantined."). Importantly, a public school library may have even more latitude to filter, as content selection within school libraries has been upheld to be permissible when grounded upon legitimate pedagogical purposes. See *Board of Educ. v. Pico*, 457 U.S. 853, 871 (1982).

above, the present crop of database ratings systems in particular are subject to unpredictably large overbreadth and may be subject to challenge on that basis.⁸⁸ Given the present state of the technology and current First Amendment doctrine, it is likely that public libraries will be severely constrained, if permitted at all, in their ability to broadly filter Internet content.

The significance of this analysis, however, is that it reveals the importance of the evolution of filtering technology. Filters with more accuracy and precision—that is, filters that confidently allow blocking closely limited to unprotected or under-protected content—will change the landscape of this analysis. The revolution of PICS may change the ability of the government to constitutionally regulate Internet content. Therefore, it is next necessary to consider what the state may permissibly do with respect to PICS.

IV. "INDIRECT" REGULATION: THE SUPPORT OF INTERNET LABELING

Since constitutional limitations on the government's power to impose direct filtering will decrease as the technology becomes more sophisticated, the government may attempt to influence the development of filtering technologies. Specifically, the government might consider the growth of a label system like PICS to be an important precursor to further content regulation on the Internet. As noted above, once widespread labeling is in place, users would place increasing value on the ability to filter out unwanted content, leading to increasing in-

88. See *supra* note 18 and accompanying text; see also *Reno v. ACLU*, 117 S. Ct. at 2344-45; *Gooding v. Wilson*, 405 U.S. 518, 521 (1972) (holding that overbroad statutes are unconstitutional); *NAACP v. Alabama*, 357 U.S. 449, 462 (1958) (holding that the government regulation must fit the intended ends). The current scope of the overbreadth doctrine is uncertain. In *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), the Court noted that regulations will be invalidated on overbreadth grounds only if "substantially overbroad in relation to the statute's plainly legitimate purpose." *Id.* at 622. And in *Brockett v. Spokane Arcades*, 472 U.S. 491 (1985), the Court held that a statute susceptible to a narrowing construction will not be held overbroad on the basis of a broader construction. See *id.* at 509. In the filtering and blocking case, courts will have ample evidentiary material to consider the quantitative approach of *Broadrick*, though the line between substantial and insubstantial overbreadth is not at all clear. *Brockett*, on the other hand, seems inapplicable, since the technological filter at issue is resistant to alternative constructions, broader or narrower.

centives to label independent of the government mandate.⁸⁹ The next part will consider some possible approaches the government may take to stimulate the growth of PICS and their constitutional validity.

A. MANDATORY RATINGS OR LABELING

An obvious way to support the growth of a PICS labeling system is to mandate it. The government could pass a statute directly requiring the labeling of Internet content according to the PICS standard and back up such a labeling requirement with fraud penalties for misrating.⁹⁰

First, a note about an important distinction. As will be seen below, it is important at the outset to recognize the critical difference between mandating *the labeling* and mandating *the labeling according to a designated ratings system*. The latter is a classic content-based restriction on speech: the government is distinguishing among categories of speech according to content. A claim of impartiality across the established categories will not save the statute, as the government certainly will not endorse or authorize the unprotected categories of speech extant in the ratings system. Mandatory labeling according to a defined ratings system brings the facts much closer to a prescribed orthodoxy than to government neutrality.⁹¹

But the government's objective—the growth of (private) regulation of content—may well be served by either form of

89. This suggests that the government could anticipate the positive network externalities associated with labeling by requiring less than all of the net content to be rated. For example, all commercial content could be required to be rated, creating less of a regulatory burden and decreasing some First Amendment impact.

90. Senator Patty Murphy announced in late summer 1997 that she would introduce legislation making the misrating of sites criminally punishable. See Danny Westneat, *Senator Murray's Internet Controls Draw Fire*, SEATTLE TIMES, July 15, 1997, at A12. To date, however, no such legislation has been introduced on a national level. Because the fraud penalties are contingent upon the underlying question of whether the government may directly coerce labeling of content, they are beyond the scope of this paper. I mention them simply to denote some enforcement mechanism that would get at a crucial problem with self-rating systems: misrating.

91. Compare *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633-34 (1943) (striking down mandatory flag salutes as promoting a government orthodoxy) with *Buckley v. Valeo*, 424 U.S. 1, 58 (1976) (upholding disclosure requirements as the "least restrictive means" of supporting the government's significant—but politically neutral—anti-corruption interests).

regulation. Mandating labeling according to sexual content, for example, even without specifying the “levels” or granularity of the ratings system, will in essence jumpstart the market for ratings systems. Politicians are likely to be happy with any rating system that allows parents to filter out unwanted sexual content, and savvy legislators are likely to realize that the market may produce a more useful system over time than they may create through legislation. In any event, the government gets what it wants: the enablement of private—probably home-based—content regulation. Directly specifying the ratings system along with mandating the labeling is probably not necessary to encourage the spread of this technology, and avoiding this step will reduce the constitutional concerns of the measure.⁹² Therefore, legislators considering this constitutional difficulty will likely choose a labeling statute that does not establish a ratings system.

But even a statute that does not establish a ratings system may be constitutionally vulnerable on several grounds. First, and most directly, producer-speakers could bring a First Amendment claim on the grounds that the mandatory labeling is compelled speech. Second, a related attack would be that the scheme compels the speaker-producers to associate with the ratings system, and therefore is a violation of the right against compelled association. A third approach would be to challenge the ratings themselves as not narrowly tailored to their purpose, either due to vagueness, overbreadth or both. Finally, Professor Lessig has argued that the imposition of a PICS system would be unconstitutional on the grounds that in choosing a broader filtering scheme than necessary—that is, by forcing PICS labeling rather than limiting the access of children to indecent speech—the government exceeds its constitutional authority to regulate Internet content.⁹³ However, as I demonstrate in this section, as long as the government involvement remains substantially indirect, the PICS-enforcing statute is likely to be constitutional.

92. As I describe more fully below, this is primarily because “avoiding the details” appears to exploit the crucial public-private distinction. See *infra* notes 159-69 and accompanying text.

93. See Lessig, *supra* note 8, at 665-69.

1. The Compelled Speech Attack

The mandatory labeling of Internet content could be attacked by a producer on the basis that the attachment of labels constitutes compelled speech. The Supreme Court has held that the right not to speak is within the protections of the First Amendment.⁹⁴ The right against compelled speech, however, is not complete. Specifically, the Court has recognized that the government may not force citizens to speak its own views,⁹⁵ to make financial disclosures without a sufficient government interest,⁹⁶ to speak in a way that is ideologically hateful to the individual,⁹⁷ to speak when speech would create a realistic chance of reprisal,⁹⁸ or to include additional speech that would alter the content of the speaker's message.⁹⁹ On the other hand, the Court has allowed compelled speech where it "better enable[s] the public to evaluate" the speech without causing additional misunderstandings,¹⁰⁰ where it causes little burden,¹⁰¹ or where the government interests are "sufficiently important" and implemented by the least restrictive means.¹⁰² In addition, the Federal government has a panoply of regulations which compel speech, such as the FDA's regulations regarding

94. See, e.g., *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 348 (1995) (state cannot require individuals to identify themselves in campaign literature); *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 795 (1988) (striking down requirement that charities reveal the percentage of their funds spent on charitable activities); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (state cannot require an individual to participate in the dissemination of an ideologically hateful message); *Miami Herald Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (state cannot force a newspaper editor to publish editorial responses); *Barnette*, 319 U.S. at 633 (compulsory flag salutes are unconstitutional).

95. See *Wooley*, 430 U.S. at 714; *Barnette*, 319 U.S. at 633.

96. See *Riley*, 487 U.S. at 798.

97. See *Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1, 17-18 (1986) (striking down requirement that public utility place third-party newsletter in mailings to customers).

98. See *McIntyre*, 514 U.S. at 379.

99. See *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557, 559 (1995) (holding that parade organizers had no obligation to allow an ideologically opposed organization in their parade).

100. See *Meese v. Keene*, 481 U.S. 465, 480 (1987) (holding that the state can compel the placement of a "political propaganda" label on foreign films).

101. See *id.* (holding forced speech constitutional where it places no burden on speaker).

102. See *Buckley v. Valeo*, 424 U.S. 1, 29 (1986) (holding that the government's interest in appearance of a proper political process is a substantial interest that outweighs certain First Amendment values). This is generally considered to be strict scrutiny.

food and drug information and labeling, or mandatory disclosure under Federal Securities laws.¹⁰³

a. No Burden to First Amendment Rights: The Keene and Wileman Bros. Analysis

The case most factually analogous to a government-imposed labeling scheme is *Meese v. Keene*, in which Keene, a distributor, challenged a regulation requiring labeling of material deemed by the State Department to be "political propaganda."¹⁰⁴ Keene challenged the labeling primarily on the basis that the addition of a label to the material—in that case, films—would decrease the demand because of the pejorative connotation of the term "political propaganda."¹⁰⁵ The Supreme Court, however, held five to three that the addition of the mandatory label "place[d] no burden on protected expression."¹⁰⁶ Rather, the Court

103. While I am unaware of any challenge to these compelled speech schemes on First Amendment grounds, these regulations may be less constitutionally questionable because they deal with commercial speech, and—at least in the case of the FDA regulations—the labels are affixed to products rather than to speech. In this sense, *Glickman v. Wileman Bros.*, 117 S. Ct. 2130 (1997), is instructive. In *Wileman Bros.*, the Court found that compelled subsidies for generic fruit advertising did not burden First Amendment rights, and instead evaluated the program "under the standard appropriate for the review of economic regulation." *Id.* at 2138.

104. 481 U.S. at 468. That the underlying speech in *Keene* was of foreign origin (foreign films) does not make the case any less analogous. In the compelled speech context, the First Amendment right is that of the editor (i.e., the individual wishing to *not* speak), not necessarily the original producer of the material. See, e.g., *Miami Herald Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (discussing First Amendment rights of editors). So in *Keene*, the asserted First Amendment right was that of the distributor, an American citizen. 481 U.S. at 467, 474 (describing Keene as an attorney, member of the California State Legislature, and citizen). Indeed, the Court in *Keene* explicitly compared the rights at issue to those presented in *Lamont v. Postmaster General*, 381 U.S. 301 (1965), and *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), cases involving both domestic "editors" and domestic speech. See *Keene*, 481 U.S. at 475-76, 481-82. Finally, there is no hint in the language or reasoning of the *Keene* opinion that the origin of the underlying speech was given any weight whatsoever.

105. *Keene*, 481 U.S. at 468-69.

106. *Id.* at 480. At least one commentator has suggested that *Keene* is irreconcilable with *Riley's* "broad language" supporting strict scrutiny for compelled speech. See Chris Kelly, *The Spectre of a 'Wired' Nation: Denver Area Educational Telecommunications Consortium v. FCC and First Amendment Analysis in Cyberspace*, 10 HARV. J.L. & TECH. 559, 636 (1997); see also Lesig, *supra* note 8, at 662 n.95. But the cases can simply be harmonized by recognizing that the Court—in all such cases—first determines whether the compelled speech "burdens protected expression." *Keene*, 481 U.S. at 480. While the Court has noted that compelled speech is as constitutionally ques-

stated that "by compelling some disclosure of information and permitting more [Congress] simply required the disseminators of such material to make additional disclosures that would better enable the public to evaluate the import of the propaganda."¹⁰⁷ Additionally, the Court found the term "political propaganda" to be a "broad, neutral [term] rather than a pejorative one."¹⁰⁸

Whether the standard applied in *Keene* or the more traditional doctrine of compelled speech would apply to the PICS-enforcing statute will turn largely upon whether the speaker-producer can demonstrate a burden on protected expression.¹⁰⁹ The government would describe *Keene* as broadly holding that merely requiring the labeling of speech does not burden free expression, and would argue that the enforced labeling of Internet content via a PICS label would be even less troublesome than the labeling in *Keene*, since the label itself is normally readable only by computers.

The challenger's response would be two-fold. First, she could demonstrate the negative impact of a particular PICS la-

tionable as speech regulation, the Court reaches this point *after determining that the compulsion of speech was as burdensome as direct speech regulation.* See *Tornillo*, 418 U.S. at 256. In *Wooley and Barnette*, the burden on protected speech was the attempt to promote government orthodoxy (and perhaps thereby drown out other views). See *Wooley v. Maynard*, 430 U.S. 705, 715 (1977); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641-42 (1943). In *Pacific Gas and Tornillo*, the burden was much more direct: that the right of response was triggered on the basis of earlier speech meant that the speaker would be chilled from uttering some types of speech. See *Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1, 18 (1986); *Tornillo*, 418 U.S. at 257. And in *McIntyre*, the chilling effect from the possibility of reprisal was an unquestionable burden. See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 379-80 (1995). In contrast, the Court in *Wileman Bros.* found that the plaintiffs' "criticisms of generic advertising provide no basis for concluding that the factually accurate advertising constitutes an abridgement of anybody's right to speak freely." 117 S. Ct. at 2139-40. And while it is quite possible to argue against the *Wileman Bros.* and *Keene* decisions on this basis, the Court's unifying theme appears to be that the compelled speech must burden in some sense the concomitant rights of speech. *Id.* at 2138. Therefore, in order to raise a First Amendment compelled speech claim, a challenger must show a causal link between the compelled speech and a burden on protected expression.

107. *Meese v. Keene*, 481 U.S. 465, 480-81 (1987).

108. *Id.* at 483. The Court also noted the "respect" for Congress's power to define the terms that it uses in legislation. *Id.* at 484. Because the term was defined neutrally in the statute, and had been widely used without challenge, the Court would not attribute a negative meaning. See *id.*

109. See *supra* notes 83-84 and accompanying text.

bel.¹¹⁰ By labeling content as sexually explicit, the producer would be demonstrably excluding potential audience members—those who use computers with filter options to block sexually explicit material. This is unlike the vague “pejorative connotation” alleged in *Keene*. Here there is a demonstrated reduction in audience size. Moreover, the Court in *Keene* noted that the speaker could counteract any negative connotation towards the film by attaching additional labels or explanations.¹¹¹ In the PICS case, this is not possible—the label triggers the blocking mechanism before there is any opportunity to even view the content, and PICS does not allow “explanatory” material in addition to ratings. Second, the speaker-producer could note the “burdens” associated with the labeling itself, specifically that the cost in time and effort to determine and program the label might dissuade further production.¹¹²

How this factual “burden” determination will turn out is anyone’s guess. But it is also irrelevant. Whether *Keene* applies or not will determine only the level of scrutiny applied; under *Keene* and *Wileman Bros.*, the Court—applying rational basis review—would merely determine whether the law is rationally related to the asserted interests, which it almost certainly is.¹¹³ But as I discuss below, there is reason to believe that the PICS-enforcing statute would survive intermediate and even strict scrutiny.

110. Ideally, there would be empirical evidence to demonstrate how many potential audience members were lost due to a particular rating, such as for “sexual activity.”

111. See *Keene*, 481 U.S. at 481.

112. In *American Libraries Ass’n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997), one long time Internet expert testified that he tried to imbed PICS-compliant labels in his online newsletter site but finally gave up after several hours. See *Testimony cited in ACLU, Fahrenheit 451.2: Is Cyberspace Burning?* (visited Oct. 20, 1998) <<http://www.aclu.org/issues/cyber/burning.html>>. This is distinct from the author’s experience, where a web page was labeled within fifteen minutes and with minimal effort.

113. The only possible question is whether the PICS statute is likely to be at all effective. Given the low level of rationality review, however, it seems highly likely that Congress would be given the benefit of the doubt. See *Glickman v. Wileman Bros.*, 117 S. Ct. 2130, 2152 (1997) (holding that regulation of economic activity “is plainly permissible short of something so arbitrary as to fail the rational basis test”).

b. *Intermediate Scrutiny: The Content-Neutrality of a PICS Statute*

If the hypothetical statute is drawn broadly enough to require that all Internet speech be labeled rather than singling out any particular speech for labeling, then the statute looks quite similar on its face to the "content-neutral" provisions given intermediate scrutiny in *Turner Broadcasting v. FCC*.¹¹⁴ In *Turner*, the Court found that the requirement that cable television networks carry certain broadcast signals "did not burden or benefit speech of a particular content,"¹¹⁵ and upheld the laws under the *O'Brien* test.¹¹⁶ In the PICS-enforcement case, the statute on its face applies equally to all speech posted on Internet web pages. It does not discriminate according to content. The fact that it focuses only on Internet-based speech, the argument goes, does not justify strict scrutiny under the Court's precedent.¹¹⁷

The challenger's primary response to this argument is that by forcing labeling according to the content of speech, the

114. 512 U.S. 622, 663-64 (1994). At issue in *Turner* were a series of "must carry" provisions that forced cable companies to carry local commercial and public broadcast stations. The Court upheld these provisions. See *id.*

115. *Id.* at 645.

116. *Id.* at 662. Content-neutral regulations that impose an "incidental" burden on speech are analyzed according to intermediate scrutiny. See *United States v. O'Brien*, 391 U.S. 367, 376 (1968); see also *Ward v. Rock Against Racism*, 491 U.S. 781, 789 (1989). So-called "time, place, and manner" regulations are also analyzed in this mode. See, e.g., *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). Under *O'Brien*, a content-neutral regulation will be upheld if: "[1] it furthers an important or substantial governmental interest; [2] if the governmental interest is unrelated to the suppression of free expression; and [3] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." 391 U.S. at 377 (numbering added). The significant analysis of the *O'Brien* test is primarily part [2]; the Court has not closely followed the "no greater than essential" restriction in part [3]. See *Clark*, 468 U.S. at 299.

117. "It would be error to conclude . . . that the First Amendment mandates strict scrutiny for any speech regulation that applies to one medium (or a subset thereof) but not others." *Turner*, 512 U.S. at 660. Instead, the Court has held that such media discrimination will only raise serious constitutional questions in certain circumstances, such as when it targets a small number of speakers, and is justified when the differential treatment is based on the special characteristics of the medium being regulated. See *id.* (citing *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983)). Here, the Internet contains a very large number of speakers and the pervasiveness, ease of access, and difficulty of public regulation probably avoids the discriminatory concern.

PICS-enforcing statute is ipso facto content-based.¹¹⁸ This is a difficult position, because—if the statute is carefully-drawn—Congress will leave the ratings and rating systems wholly up to private parties. The fact that the statute might require all web pages to be rated is probably not enough to raise content-based questions, because the regulation applies to all web pages, regardless of the specific content. The burden of rating will be the same on all speakers.¹¹⁹ If the challengers could show that the “burden” of the PICS-enforcing statute applied differently to different types of speech—say by introducing factual findings that labels indicating high sexual or violent content would reduce traffic or stigmatize the speakers—the argument gains some force. Although the Court rejected this argument in *Keene* on factual grounds,¹²⁰ it appears to have accepted it to some degree in *Riley*.¹²¹ But, in the case of PICS, the government has the powerful response that all particulars of the compelled speech—the individual “levels” of the ratings system, for example—are controlled by private parties. The compelled speech is not “triggered” by a particular message¹²²

118. Professor Lessig, drawing support from some of the Court’s language in *Riley*, makes the more direct claim that compelled speech is inherently content-based. See Lessig, *supra* note 8, at 662 n.95. This conclusion, if it was ever applicable to the facts of *Riley*—and I doubt it was—certainly did not survive *Turner*, where the Court not only described *Riley* as content-based in application—noting that the basis of the *Riley* holding was that “solicitation of funds trigger[ed] a requirement to express [a] government-favored message”—but also proceeded to analyze the “compelled speech” must-carry provisions as *content-neutral* regulations meeting intermediate scrutiny. 512 U.S. at 655.

119. To be fair to Professor Lessig, he appears to be analyzing a statute that would require rating only of what he calls “*Ginsberg* speech”—speech from which the government has a legitimate interest in protecting children. See Lessig, *supra* note 8, at 657-69. A statute only requiring labeling of pages with a significant degree of sexual content is plainly content-based; my point is that a relatively minor change in the statute leads to a very different result and is probably as likely to occur, given the advantages.

120. The Court simply did not accept that the application of a “propaganda” label would “have actually had any adverse impact on the distribution” of the materials. *Meese v. Keene*, 481 U.S. 465, 483-84 (1987).

121. The Court noted that in the context of fundraising, the compelled disclosure of financial overhead percentages “could encourage or discourage the listener from making a . . . donation [and] would clearly and substantially burden the protected speech.” *Riley v. National Fed’n of the Blind*, 487 U.S. 781, 798 (1988). Admittedly, on this point, *Riley* and *Keene* are difficult to square.

122. Cf. *Miami Herald Co. v. Tornillo*, 418 U.S. 241 (1974); *Pacific Gas & Elec. Co. v. Public Util. Comm’n*, 475 U.S. 1 (1986).

and is not determined by the government.¹²³ Indeed, the latter point makes the PICS-enforcing statute appear further attenuated from the government-mandated-and-written labels upheld in *Keene*, and perhaps even less questionable.

Given the present doctrine, whether the PICS-enforcing statute is considered content-neutral will likely turn on the *interests* at issue. That is, the central question is whether the government's enablement or support of private/individual regulation (even censorship) is related to the suppression of free expression. The key to this analysis is to recall that the "interests related to the suppression of free expression" *must be those of the government* rather than those of private parties. With this fact in mind, the government could put forth at least two plausible content-neutral governmental interests to explain its action.

i. market-facilitation: the analogy to *Turner Broadcasting*

In *Turner*, the Court held that "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order."¹²⁴ A similar argument might be made in favor of the PICS-enforcing statute, specifically that the imposition of "must-rate" rules, like the "must-carry" rules in *Turner*, are necessary to ensure the continued growth of a diversity of voices on the Internet.¹²⁵ In this way,

123. Cf. *Riley*, 487 U.S. at 798.

124. *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 663 (1994). I must admit that it seems a bit odd to talk of interests in "diversity" as content-neutral. Certainly diversity interests are not content-specific, but they seem to imply an interest in *the different*, an interest in anything not currently available, which seems less than wholly agnostic.

125. Relatedly, *Turner's* finding that the importance of local broadcasting outlets *themselves* "can scarcely be exaggerated," may support a claim that the growth of the Internet *itself* would be a sufficiently important content-neutral basis for imposing self-rating. See *id.* at 663 (citing *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968); see also *Reno v. ACLU*, 117 S. Ct. 2329, 2344 (1997) (noting the great communicative virtues of the Internet). However, in *Reno v. ACLU*, the Court noted that this argument assumes that "the unregulated availability of [unwanted content] is driving countless citizens away from the medium because of the risk of exposing themselves or their children to harmful material." 117 S. Ct. at 2351. Certainly the continued growth of the Internet seems to repudiate the idea that any stifling is occurring. There are debates about the most appropriate measure of the "size" of the Internet (and therefore the size), but nobody seems to think that the growth rate is slowing. See, e.g., Jamie Murphy, *It's Not the Size that Counts, But How You Measure It*, N.Y. TIMES (CYBERTIMES) (visited June 5, 1998) <<http://www.nytimes.com/library/tech/98/07/cyber/articles/05big.html>>. Note,

the claim would be one of market failure: that the lack of Congressional action in response to the content control problem will lead to migration towards poor second-best solutions that will restrict the diversity of voices in much the same way as Congress was concerned with when it enacted *Turner's* cable television regulations.

The most plausible "second-best" solutions to the content-control problem that may emerge in the absence of government regulation are combinations of both convergence on vertically-integrated ISPs and pervasive third-party censorship. Vertically-integrated ISPs are those which produce and maintain their own content as well as provide access to the wider Internet. A familiar example of this is America Online (AOL), the most-used ISP in the world, which provides members access to the Internet, to its own proprietary content, and to "chat" areas.¹²⁶ A plausible source of AOL's popularity among new Internet users is its commitment to content control—AOL limits content within its proprietary area and provides blocking services for Internet content. In addition, AOL gains significant revenue from advertising, merchandising, and other content-related sources.¹²⁷ In this sense, AOL produces content, much like a local television broadcaster. But AOL is also a service provider, akin to a cable operator. As the Court noted in *Turner*, vertical integration would encourage providers to drop some broadcasters and to favor affiliated programmers.¹²⁸ Similarly, AOL will have little incentive to include others' content for the benefit of its members and may even have strong incentives to block members' access to outsiders' content in an

however, that time *could* change this conclusion: it is plausible that the Internet might not reach its potential as a widespread commercial and communicative medium without some way to allay the fears of those concerned about the availability of inappropriate materials. For example, the manipulation of popular Internet "search engine" results by pornographic web sites is an issue likely to resonate with those considering whether to connect to the Internet. See, e.g., *www.oneplace.sex? Internet Porn Would Be Easy to Filter (or Find)*, SAN JOSE MERCURY NEWS, June 5, 1998, at 6C (editorial noting that the Internet is turning into a minefield for parents because "their children are . . . inadvertently being exposed to . . . the profane" and that "[e]ven word searches for seemingly innocuous terms can trigger ads for erotica").

126. See *America Online* (visited Oct. 16, 1998) <<http://www.aol.com>>.

127. See *1997 Annual Report—America Online, Inc.* (visited Oct. 16, 1998) <http://www.aol.com/corp/inv/reports/1997/6_financials/6_pg03a.html>.

128. See *Turner Broad. Sys. v. FCC*, 117 S. Ct. 1174, 1190 (1997).

effort to decrease the viability of other speakers.¹²⁹ In short, the impossibility of controlling access on the wider Internet might lead to a convergence among vertically-integrated access providers—those that could respond by offering a large quantity of proprietary or heavily filtered (i.e., “guaranteed suitable”) material. This convergence would make the non-integrated content providers less viable, and it could reduce the diversity of media outlets available on the Internet. Given the Court’s “substantial deference to the predictive judgments of Congress,”¹³⁰ it is at least plausible that an analogy to *Turner* would convince a court that the PICS-enabling statute is content-neutral.

ii. enabling parental controls: supporting the protection of children

A second clearly-defined government interest is the support of parents (and perhaps others acting in place of parents, such as schools) in controlling the sexual and violent content of the material their children are exposed to on the Internet. This is an *enabling* interest rather than a content-based interest: the causal link between the interest and the possible suppression of protected speech is weak at best.¹³¹ Therefore, attacks on the statute as content-based would have to overcome this public-private discontinuity. Significantly, the Court has held that “the First Amendment, the terms of which apply to governmental action, ordinarily does not itself throw into constitutional doubt the decisions of private citizens to permit, or to restrict, speech.”¹³² In essence, the speaker-producers would

129. An obvious rejoinder is that users will not put up with this, and will either pressure AOL to change its policies, or switch to another ISP. In this way, AOL competes in a much more robust market than cable operators, who might have a local monopoly. But the cable operators in *Turner* had, and lost, this argument as well—that users could simply use over-the-air signals to tune into the local broadcasters. See *Turner*, 512 U.S. at 661.

130. *Id.* at 665.

131. One possible route of exploration is through a market-based analysis. That is, a speaker-producer of protected speech could claim that the existence of low-cost private choices regarding censorship would result in the constructive suppression of particular views. Although this case is hard to make—it will depend in large part upon a court’s acceptance of network externality theory and perhaps economic modeling—it is more likely to be a successful approach to this public-private discontinuity than direct or indirect attacks on the doctrine itself.

132. *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 737 (1996).

have to show that the government interest in enabling and empowering private user choices are equivalent to the suppressive interest in direct governmental regulation. There are three ways that this might play out, one more likely than the others. First, the most likely scenario is that the Court will view this as just another cut at the question of "burdens" on free expression caused by the PICS-enforcing statute.¹³³ Because the burdens to speech are lower in the private-enabling regime than in a direct public regulation regime, it is plausible to conclude that the Court will find that the intermediate scrutiny *O'Brien* test is satisfied.¹³⁴

The second, and somewhat less likely, scenario is that the Court will refuse to blur the public-private distinction here, falling back upon the narrow view the Rehnquist Court has taken towards the state action doctrine.¹³⁵ Under this framework, because the private interests do not bear a direct causal link to government regulatory interests, there would be no First Amendment claim at all. Professor Lessig appears to argue for the inverse form of this scenario (although couching it

133. The relative burdens analysis is more properly located in the "fit" or narrow tailoring inquiry discussed below. See *infra* notes 142-44, 149-52 and accompanying text.

134. See *United States v. O'Brien*, 391 U.S. 367, 377 (1968); see also *supra* note 116 and accompanying text (discussing the *O'Brien* test and related Supreme Court holdings).

135. Since the early 1980s, the Court has approached the "state action" requirement from two perspectives, neither of which seems to weigh in favor of equating a private ratings system with state action. The first is that used in *Blum v. Yaretsky* and *Rendell-Baker v. Kohn*: that "constitutional standards are invoked only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982); see also *Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1982). The second was used in *Lugar v. Edmondson Oil Co.* and *Edmonson v. Leesville Concrete*, where the Court looked to two factors: (1) whether state authority undergirded the alleged unconstitutional act, and (2) whether the litigant must be fairly considered a state actor. See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982). The privately-developed PICS-compatible ratings system is not supported by the PICS-enforcing statute in a *Lugar* and *Edmonson* way—the government's requirement that labels be applied does not bear a causal link to a particular private ratings system—for in the hypothetical PICS-world, a (private) market for ratings systems develops. See, e.g., Lessig, *supra* note 8, at 663. And the private creator of a private ratings system can hardly be fairly described as a state actor; indeed, there is no certainty that the market-developed ratings systems would even square well with Congressional interests (a risk that Congress may have to take when conceding the details of ratings to private parties).

in other terms as discussed below),¹³⁶ contending that enforced PICS would be unconstitutional because of the changes in the underlying architecture of speech distribution.¹³⁷ While there is perhaps reason to be uneasy about even privately-developed filtering and labeling schemes, as a descriptive matter, the current doctrine of the public-private distinction does not appear to support the conclusion that these schemes are unconstitutional.¹³⁸

The third scenario is that the Court may fail to differentiate between the government's *interests* and its *motivation*. If the Court concluded that the government is motivated by the desire to suppress speech in its implementation of the PICS-enforcing statute, and it equated this motivation with a government interest to suppress expression, the private and public "interests" would appear to be aligned, allowing the Court to impose strict scrutiny in its review of the statute. However, I believe that this is an unlikely result given the presence of the two content-neutral government interests noted above and the reluctance of the Court to inquire deeply into legislative motivation.¹³⁹

Finally, any discussion about the appropriateness of equating the interests of private ratings developers with the government's interest cannot overlook the fact that this gets a plaintiff only part of the way. The final—and crucial—step of "compelling speech" in this process is performed by the speaker-producer *herself* when she selects the content she wants to ban from her computer screen. To be sure, she is heavily constrained by the requirement to rate and the particulars of the rating system (or systems) that she chooses, but she still has a measure of choice and consideration that no

136. Lessig argues that a PICS-enforcing statute would be unconstitutional because it is not narrowly-tailored and runs afoul of the Court's decisions in *Lamont v. Postmaster General*, 381 U.S. 301 (1965) and *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60 (1983). See Lessig, *supra* note 8, at 666-67.

137. See Lessig, *supra* note 8, at 666.

138. This is not to criticize Professor Lessig's efforts to change the thinking about private-public distinctions. His efforts to do so are important. My intent here, however, is to note how the present doctrine might apply to these issues, to promote a full understanding of the underlying questions involved.

139. The Court has often disavowed analysis based on legislative motivation. See, e.g., *United States v. O'Brien*, 391 U.S. 367, 383 (1968) ("It is a familiar principle of Constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.").

plaintiff in any of the Court's compelled speech decisions has had.¹⁴⁰

Before moving on to the strict scrutiny analysis, it is important to consider how the PICS-enforcing statute will fare under the "no greater than essential" requirement of the *O'Brien* test.¹⁴¹ The statute is very likely to survive this requirement, primarily because the Court has not closely followed the original standard.¹⁴² In *Turner*, the Court described the "fit" under intermediate scrutiny as satisfied if the "regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."¹⁴³ This new lesser standard for the "fit" would probably be met by the PICS-enforcing statute given the government interest and the absence of effective alternatives to governmental intervention. Given the interests at stake and the relatively low burden imposed by the PICS-enforcement requirement, the statute is likely to survive this element of the *O'Brien* standard and be upheld as a content-neutral provision.¹⁴⁴

140. See *Glickman v. Wileman Bros.*, 117 S. Ct. 2130 (1997) (plaintiffs forced to pay for generic advertising); *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 798 (1988) (forced to disclose particular financial details); *Wooley v. Maynard*, 430 U.S. 705 (1977) (forced to be a "government billboard"); *Buckley v. Valeo*, 424 U.S. 1 (1976) (forced to disclose contributors); *Tornillo v. Miami Herald Co.*, 418 U.S. 241 (1974) (forced to print others' speech); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (forced to salute flag).

141. See *United States v. O'Brien*, 391 U.S. 367, 377 (1968); see also *supra* note 116 and accompanying text (discussing the *O'Brien* test and related Supreme Court holdings).

142. See, e.g., *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 299 (1984) (holding that the Court of Appeals' view that there were less speech-restrictive alternatives available was no more than a disagreement with the Park Service about the proper implementation of a policy, and that *O'Brien* does not "assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks"). See generally *Ely, supra* note 81, at 1486-88 (noting the "apparent discontinuity" in the Court's approach to the less restrictive alternative analysis).

143. *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 622 (1994) (citing *Ward v. Rock Against Racism*, 491 U.S. 799 (1989)). This is related to the discussion of equally effective alternatives below. See *infra* notes 149-53 and accompanying text.

144. Lessig correctly notes that there are differences in the "narrowly-tailored" requirement in the content-based and content-neutral cases, but argues that a PICS-enforcing statute would fail either primarily because "[s]uch a regime would result in a wider range of filtered speech than the legitimate interests of government would allow." Lessig, *supra* note 8, at 665 n.101. As I noted above, I view this as another approach to the private-public distinction that these issues raise. See *supra* text accompanying notes 123-124. Left out

c. *Strict Scrutiny*

In *Buckley v. Valeo*, the Supreme Court upheld the mandatory disclosure of large donors to political campaigns notwithstanding the application of strict scrutiny because the requirement was the least restrictive means of addressing the Congress's "substantial" interest in "curbing the evils of campaign ignorance and corruption."¹⁴⁵ The government's interest in passing the PICS-enforcing statute may warrant similar treatment. The statute is intended to protect children, an interest the Court has described as compelling.¹⁴⁶ Relatedly, and equally importantly, the statute is overwhelmingly intended to empower parents to control the content of materials viewed by their children. The Court has called the right of parents to direct the upbringing of their children "cardinal"¹⁴⁷ and has repeatedly recognized the strong government interest in supporting these activities.¹⁴⁸ Given the explicit joinder of these two already significant interests, the Court would probably find that the government interest in enacting the PICS-enforcing statute is compelling.

Then the critical issue becomes the relationship between the PICS-enforcing statute and the government's interests or the "fit" between means and ends. In the strict scrutiny/compelled speech context, the Court has required the use of the "least restrictive means."¹⁴⁹ In other strict scrutiny cases, the Court has analyzed whether the statute was "narrowly tailored" to the governmental interests.¹⁵⁰ But Professor Volokh has noted that the Court's most recent application of strict scrutiny, in *Reno v. ACLU*, used an "equally effec-

of Lessig's claim is the recognition that the "wider range of filtered speech" would result from a myriad of *individual private choices*, not from government action to suppress speech. I do not argue that the PICS-enforcing statute will not result in more filtered speech—it surely will—I simply argue that where the filtering is a private concern, it cannot be analyzed as if it were state action.

145. *Buckley*, 424 U.S. at 68.

146. See *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989); *Ginsberg v. New York*, 390 U.S. 629, 636 (1968).

147. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

148. See *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978); *Ginsberg*, 390 U.S. at 639.

149. *Buckley*, 424 U.S. at 68.

150. See *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1995); *Burson v. Freeman*, 504 U.S. 191 (1992); *Boos v. Barry*, 485 U.S. 312 (1988).

tive alternative" test to strike the CDA.¹⁵¹ In *Reno*, the Court held that the burden on speech was unacceptable because "less restrictive alternatives would be at least as effective" in achieving the government's ends.¹⁵²

Applying this doctrine, the "fit" of the PICS-enforcing statute can be viewed in two ways. First, the (theoretical) precision and efficiency of a PICS-enabled system is wholly unprecedented; the cheap labels, self-rating requirement, and empowerment of parents would appear to be quite narrowly tailored to the twin interests of protecting children and supporting parents. Unfortunately, it compels labeling of *all* speech, even that which the government does not have an interest in shielding from minors, although the Court held in *Ginsberg* that *some* spillover effects would not render a law unconstitutional.¹⁵³ Certainly "some" allowance for spillover does not imply that the spillover could necessarily reach all speech under a *Ginsberg* set of facts. But spillover implies both quantitative and qualitative judgments, and it is worth remembering here that the burden on speakers—the requirement to rate pages—is much lower than the flat prohibition on sales considered in *Ginsberg*. So while the spillover in the PICS-enabling case is much broader, it would be less burdensome, and thus might be seen by the Court as roughly equivalent to the statute at issue in *Ginsberg*.

The second, and I suspect more difficult, issue for the PICS-enforcing statute is whether the Court will find it to be "effective" enough. The government will have to convince the Court that the labeling requirement is going to work at least as

151. Eugene Volokh, *Freedom of Speech, Shielding Children, and Transcending Balancing*, 1997 SUP. CT. REV. 141, 148-49 (1997). As Volokh notes, the *Reno v. ACLU* test is significantly less protective of speech: the government could overcome the "narrowly tailored" requirement by developing factual findings that the asserted alternatives are not as effective. "The pregnant negative in the Court's reasoning is that, had there really been no equally effective alternatives (as in fact there are not), the CDA should have been upheld." *Id.* at 157. In criticizing this approach, Volokh disputes that "tagging," as a factual matter, would be as effective as the CDA's flat ban. *See id.* at 149.

152. *Reno v. ACLU*, 117 S. Ct. 2329, 2346 (1997).

153. *Ginsberg v. New York*, 390 U.S. 629, 636-37 (1968). In *Reno v. ACLU*, the Court noted that the spillover argument cannot be used to justify the "unnecessarily broad suppression of speech addressed to adults." 117 S. Ct. at 2335. As long as the Court determines that the burden on speaker-producers caused by forced labeling is small, then this "narrowly tailored" argument would apply.

effectively as any other equally-restrictive alternative.¹⁵⁴ The challengers may argue that the PICS-enforcing scheme does not protect children well enough or that it is likely to be too complicated to effectively support parental choices.¹⁵⁵ But if the Court maintains its current mode of analyzing the "fit" requirement on a sort of sliding scale between the burdens and effectiveness of the law,¹⁵⁶ the low burdens of the PICS statute will weigh in favor of it being found constitutional.

In sum, the outcome of the compelled speech attack on a PICS-enforcing statute depends largely upon two questions: whether the Court finds that the requirement to rate pages burdens First Amendment rights, and whether the Court accepts the possible content-neutral rationales. If the answer to either of those questions is yes, then the statute will likely be found constitutional under current doctrine. If the Court determines that the burden on speech is slight enough to bring the case into a *Meese v. Keene* or *Glickman v. Wileman Bros.* analysis, it will find that First Amendment issues are not present on the facts and uphold the law under rational basis review.¹⁵⁷ Or, if the Court defers to the content-neutral state interests of facilitating the diversity of speech on the Internet or enabling parental protection of children, then the Court is likely to find the law constitutional under *O'Brien* intermediate scrutiny.¹⁵⁸ If, however, the Court decides that the law is both

154. This strict scrutiny framework—the requirement for the law to be “narrowly tailored,” “equally effective,” and/or “least restrictive”—appears to set up a form of sliding scale analysis. The more restrictive the law (i.e., the more burdensome on speech), the more closely aligned to the interests asserted and effective it must be. Likewise, laws with little restrictions or burdens may not be forced to be as closely tailored. See Volokh, *supra* note 151, at 193-94. Volokh argues that this “weighing” of the benefits and burdens is judicially inadministrable, and that the Court would be better served in developing more categorical rules regarding substantial and insubstantial burdens. See *id.* at 194. While I share Professor Volokh’s desire for clear rules, the Court itself has made no signs that it intends to move away from the present mode of analysis. See generally *Reno v. ACLU*, 117 S. Ct. at 2335.

155. For example, children would still be able to access improper material from computers other than their parents’, or might be able to break the code protecting the rating choices on their home computer. The PICS-enforcing statute also assumes that parents with Internet connections would be knowledgeable enough to implement the controls. Both of these questions are distinctly factual in nature, and ones I think can go either way.

156. See *supra* note 147 and accompanying text.

157. See *supra* notes 102-10 and accompanying text (discussing the criteria the Court uses for determining which standard of review applies).

158. See *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

burdensome and supported by content-based interests, then the Court will apply strict scrutiny. In this context, the compelling state interests of protecting children and supporting parents as compared to the slight burden on speakers might save the law, although the case is much closer.

2. Interfering with the Architecture of the Speech Market

A second approach a challenger could take to the government's implementation of a PICS-enforcing statute is to argue that the statute exceeds the constitutional limitations on the government's power to interfere with the *architecture* of speech.¹⁵⁹ Professor Lessig has described the basis of this claim as follows:

If the government has a legitimate interest in filtering speech of kind X, but not speech of kind Y and Z, and there are two architectures, one that would filter speech X, Y and Z, and one that would filter only speech of kind X, then Congress may constitutionally push technologies of the second kind, but not the first. It may push architectures that filter speech of kind X only, and not architectures that facilitate the filtering of speech of kind X, Y, and Z.¹⁶⁰

Therefore, the argument goes that because Congress may legitimately directly block a minor's access to certain types of speech, it may not require PICS-labeling, as PICS is an architecture that enables broader speech filtering.¹⁶¹ While innovative and thought-provoking, this "architectural" approach is difficult to support under present doctrine or theory.¹⁶²

The essence of the architecturalists' constitutional claim is that government-enforced labeling would change the nature of speech distribution on the net from a default of non-discrimination to one of discrimination. This, the argument goes, is equivalent to forcing everyone to request speech before they receive it, or "as if the state required that all magazines be vended from behind counters, accessible only upon re-

159. See, e.g., Lessig, *supra* note 8, at 665-67.

160. *Id.* at 665.

161. See *id.* at 668.

162. As an initial matter, it is important to note that the architecture that would support broader filtering *does so only by private parties*. The public/private distinction—as discussed above—matters a great deal in this analysis. See *supra* notes 122-40 and accompanying text. This "architectural" approach can thus be (fairly, I think) boiled down to a contention that that the government may not enable broader private regulation if narrower public regulation is available. And while it is entirely likely that this argument is a good principle of public policy, the more significant question is whether it has support in the Constitution.

quest.”¹⁶³ But even if one accepts that this is a change in the state of speech distribution on the Internet,¹⁶⁴ the argument appears to assume a statute that requires labeling *and specifies the labels themselves*.¹⁶⁵ A law that merely requires generalized labeling and leaves the details up to private parties—as we have assumed heretofore—would not raise the same issues. This is not “all magazines behind the counter” but rather a rule that the “counter” must exist for private parties to use if they choose. Concededly, the market may well force a speaker-producer of sexually-oriented (yet protected) material to vend her magazine from behind the counter, otherwise the shopkeepers, themselves under pressure from the easily-offended shop-choosing public, will not stock the magazine anymore. Thus, the architecturalists’ quarrel is with the imposition of the counter when the government could have simply required that some magazines could only be sold with proof-of-age—indeed, behind a counter.¹⁶⁶

If one recasts the architectural claim against the PICS-enforcing statute that we have considered here—one that mandates broad labeling, but does not mandate a particular rating system or require filtering—its weaknesses become readily apparent. *Bolger*¹⁶⁷ and *Lamont*¹⁶⁸ appear to limit the government’s ability to filter and block itself, except in very narrow circumstances. That much is uncontroversial—and unlike the PICS-enforcing statute hypothesized in this section.

163. Lessig, *supra* note 8, at 668.

164. See, e.g., *Reno v. ACLU*, 117 S. Ct. 2329, 2342 (1997); Lessig, *supra* note 8, at 669.

165. Indeed, it appears to assume a statute that requires PICS labeling of only that speech which is deemed to be harmful to children. See Lessig, *supra* note 8, at 666-68.

166. The architecturalists’ argument is thus “exposed” (though it is clear enough not to need exposure) as another version of the argument against the rigid public/private distinction established by Supreme Court doctrine: that courts should consider the enablement of private regulation on (nearly) the same footing as direct public regulation. See *supra* note 135 and accompanying text. Admittedly, PICS presents this issue pretty squarely—the network effects and unintended consequences of labels make powerful arguments in favor of a more flexible state action doctrine. It just doesn’t work under the current technological and legal situation.

167. *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 69 (1983) (striking down a government ban on direct-mail advertisements).

168. *Lamont v. Postmaster Gen.*, 381 U.S. 301, 307 (1965) (striking down a requirement that postal recipients specifically request delivery of “communist propaganda”).

But *Rowan*¹⁶⁹ appears to go no further than this; at worst, the case appears to be silent on the proposition of whether the government can itself design and enforce a ratings system.¹⁷⁰ Additionally, I believe *Rowan* does not even begin to address the constitutionality of a statute that requires labeling but does not provide the labels. Because the architecturalists rely on cases that themselves appear to recognize the public-private distinction—or at least lend no authority to ignoring it—the architectural approach appears to offer little response to a

169. *Rowan v. United States Post Office*, 397 U.S. 729 (1970).

170. I would argue, however, that *Rowan* does not necessarily compel the conclusion that the government may not be involved in the design of ratings systems themselves. While the Post Office in that case merely provided a ministerial function, the basis of the decision is clearly that user-selected choices are constitutionally permissible. See *Rowan*, 397 U.S. at 737 (“Nothing in the Constitution compels us to listen to or view any unwanted communication The ancient concept that ‘a man’s home is his castle’ into which ‘not even the king may enter’ has lost none of its vitality”). There is no suggestion in *Rowan* that the government may not in some cases further assist the addressee in blocking unwanted mail, just an offhanded remark that “Congress provided this sweeping power [to block to the addressee] not only to protect privacy but to avoid possible constitutional questions that might arise from vesting the power to make any discretionary evaluation of the material in a governmental official.” *Id.* This statement implies that the government may not *itself* rate or label speech, but I believe it is silent to the question of whether the government may create labels for others to use.

The relevant question that we should ask whether *Rowan* answers is the following: may the Post Office, in support of addressee’s blocking choices, create a set of categories for content sent in the mails (presumably including various categories that many addressees might find offensive) and force mailers to categorize their mail as such? I am envisioning a sort of second zip code, containing ratings. Addressees could select which categories of content they did not wish to receive, and their choices would be administered by the Post Office. Under *Rowan*, the addressee has the unquestionable right to block unwanted mail, and—significantly—the Court tells us that the addressee need not see individual items before they are blocked. See *id.* at 738 (“The continuing operative effect of a mailing ban once imposed presents no constitutional obstacles; the citizen cannot be put to the burden of determining on repeated occasions whether the offending mailer has altered its material so as to make it acceptable. Nor should the householder have to risk that offensive material come into the hands of his children before it can be stopped.”). While not crystal clear, I believe this may be fairly read to support the dual propositions that the Post Office may help reduce the burdens of blocking from the addressee, and that the addressee need not actually see or know the specifics of the material blocked. And while it is probably a stretch to thus claim that *Rowan* allows government-imposed labeling under government-designated categories, it makes much more questionable the claim that *Rowan* forbids the government from designing (and requiring) rating systems. See, e.g., Lessig, *supra* note 8, at 668 (arguing that “*Rowan* limits the government’s power” to design rating systems).

statute exploiting the public-private distinction that it appears to brush aside.

3. PICS-Enforcement as Compelled Association

A third—and I believe more useful—attack against the PICS-enforcing statute is that it unconstitutionally compels the speaker to associate herself with the views of others by forcing her to label her page according to a ratings system that she may find abhorrent.¹⁷¹ In *Abood v. Detroit Board of Education*, the Court recognized a right to refuse to associate, at least when it involved objectionable views.¹⁷² Using the reasoning in *Abood*, the speaker-producer could claim that placing the private rating developer's label on her speech would constitute a forced association of her speech with the ideas established by the rating developer. Because this approach explicitly recognizes the existence of the private third party ratings developer, it may be more factually descriptive of the circumstances and more likely to succeed than either the compelled speech or architectural challenges described above.

Plainly, the PICS-enforcing statute does not require the speaker-producer to finance or endorse the rating system. But this leaves the argument that the rating systems themselves are ideologically-based, and that forcing a speaker to choose from a range of labeling options provided by another is equivalent to associating herself with that ideological viewpoint.¹⁷³ That is, if a ratings system offers a choice of one to

171. For example, she may find the "levels" of the ratings system to be wholly inadequate or offensive in some way. She may feel that the system does not provide her an opportunity to adequately express her rating of her content, or may feel offended by having to rate her page for sexual content even where it contains no such content.

172. 431 U.S. 209, 234 (1977) (striking down compelled fees from Union members insofar as they were used to support causes members found objectionable). This freedom of "non-association" has been limited by later cases to those organizations which are expressive in purpose. *See, e.g., Hurley v. Irish-American Gay, Lesbian and Bisexual Group, Inc.* 515 U.S. 557, 573 (1995) (upholding parade organizers' rights to exclude groups wishing to march); *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 8 (1988) (upholding anti-discrimination law targeted at some classes of private clubs); *Roberts v. United States Jaycees*, 468 U.S. 609, 611 (1984) (upholding anti-discrimination law as applied to the organization).

173. Note here that I am making an assumption—one that I contend is reasonable—that the insertion of the PICS "tags" does not alter the content of the speaker's message. Because PICS tags are invisible to the viewer, they do not affect the reaction or impact of the message merely by virtue of their insertion. This assumption distinguishes this case from *Hurley*, where distinct

five on a "sexuality" scale, does the required selection of one of the five options constitute association with the ratings system developer's views on sexuality?

However, in order to succeed on this basis, the Court would have to adopt a slightly different view on the strands of the compelled speech and association cases. The underlying theory would have to be that *just as the government cannot force citizens to espouse the government's views, the government cannot force the citizens to espouse the views of a private party.* This position would find support in *Tornillo*¹⁷⁴ and *Pacific Gas & Electric*,¹⁷⁵ in which forced rights of access for others' views were struck down, albeit as content-based compelled speech regulations.¹⁷⁶ One could also point to *Elrod v. Burns*, in which the Court barred a state from conditioning public employment on the association with a political party, for support.¹⁷⁷ However, other precedent may limit the potential of the forced association with private parties argument. The main limitations are found in *Pruneyard Shopping Center v. Robins*¹⁷⁸ and *Glickman v. Wileman Bros.*¹⁷⁹ In *Pruneyard*, the Court refused to find that a state-forced right of access violated a shopping center owner's First Amendment rights because the private third parties would: (1) "not likely be identified with [the views] of the owner,"¹⁸⁰ and (2) because the owner could "expressly disavow" any connection with the others' message by posting signs.¹⁸¹ In *Wileman Bros.*, the (5-4) majority decision rejected the compelled speech/association claim of farmers who objected to being forced to financially support government-sponsored generic advertising for their products. The Court's holding rested in part upon the fact that "requiring [plaintiffs] to pay the assessments [for advertising] cannot be said to engender any crisis of conscience," because the advertising was intended to help the plaintiff's business.¹⁸² Viewed as a whole, the cases might be interpreted as prohibiting government

ideological anathema was found unnecessary to the compelled association claim. See *Hurley*, 515 U.S. at 574-75.

174. *Miami Herald Co. v. Tornillo*, 418 U.S. 241 (1974).

175. *Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1 (1986).

176. See *Pacific Gas*, 475 U.S. at 20-21; *Tornillo*, 418 U.S. at 258.

177. 427 U.S. 347, 371 (1976).

178. 447 U.S. 74 (1980).

179. 117 S. Ct. 2130 (1997).

180. *Pruneyard*, 447 U.S. at 75.

181. *Id.* at 87.

182. *Wileman Bros.*, 117 S. Ct. at 2139.

mandates that effectively force citizens to associate with the views of private third parties where they conflict with one's own, except where one could effectively disavow such views. On this reading of the precedent, the PICS-enforcing statute would be unconstitutional because it forces speaker-producers to associate themselves with the speech of others, by labeling their pages according to a third party rating system with which they may not agree, without providing an opportunity for disavowal.¹⁸³

The essential hurdle posed by this approach is primarily a factual one: a challenger would have to convince the Court that ratings systems are ideological in nature and that the "constraint" imposed by the need to work within the boundaries of another's rating system imposed a significant expressive burden. Certainly the set-up of a rating system—the choices of categories to be used, levels to offer, the scope of the options—would appear to have significant expressive characteristics.¹⁸⁴ They certainly reflect a particular view of certain types of speech. The more difficult question, however, is whether these expressive choices are burdensome to a speaker-producer to a degree that the Court would feel significant enough to warrant invalidation.¹⁸⁵ Self-rating means that the ratings system developer has—theoretically at least¹⁸⁶—no say regarding which level is selected, although the anecdotal evidence so far shows that the developers will probably attempt to make the selection of their labels as objective as possible.¹⁸⁷ Given the correct set of facts, i.e., an especially constraining set of choices, a ratings

183. The PICS system does not contemplate the introduction of additional information beyond the rating labels themselves, so a speaker-producer has no opportunity to explain or disavow the rating. *See supra* note 112 and accompanying text.

184. *See supra* notes 37-48 and accompanying text.

185. In *Wileman Bros.*, the Court noted that the "mere fact that objectors believe their money is not being well-spent does not mean [that] they have a First Amendment complaint." 117 S. Ct. at 2140 (citations omitted).

186. *See supra* note 43 and accompanying text (describing how one ratings system, RSACi, forces self-raters using the system to affirm an "agreement" between the rater and the system developers, and noting that the current agreement contains provisions for the developers themselves to rate pages if disputes arise). To the extent that the ratings systems developers inject themselves into the rating and labeling process, arguments in favor of forced association only increase.

187. Objectivity can be increased by closely defining the content that each level can contain. *See supra* note 46 (discussing the great detail involved in the RSACi rating system definitions). This interest in objectivity can be as easily ascribed to a desire for accuracy as to any desire to impose ideology.

developer that is highly ideologically-based and perhaps willing to rate pages himself, this claim may well succeed where other approaches have failed. Because the compelled association approach directly addresses the private nature of the ratings systems, in the long run it may turn out to be a useful check on the scope of publicly-enabled-but-privately-implemented speech regulation.¹⁸⁸

B. MARKET-INFLUENCING TECHNIQUES

A third major approach Congress might use to get at content regulation on the Internet would be to engage in a series of indirect activities that have the effect of encouraging—or perhaps coercing—further filtering and blocking by speaker-producers and end users. These market-influencing techniques would come in various forms, two examples of which are already seen in proposed legislation: (1) a requirement that ISPs provide—at no charge or at cost—software designed to permit customers to limit access to material that is unsuitable for children;¹⁸⁹ and (2) a requirement that schools and libraries requesting “universal service assistance” subsidies from the Federal government and local telecommunications carriers certify to the FCC that they have selected and installed (or will install) a system to block matter deemed to be inappropriate for minors.¹⁹⁰ Some other techniques could be used, such as requiring all official government web sites to rate their pages or by only purchasing software with filtering capabilities built-in.¹⁹¹ In their essence, these influencing techniques seek to do

188. Professor Lessig in particular notes that a chief danger of PICS lies in what he calls “upstream” filtering rather than simply user filtering. See Lessig, *supra* note 8, at 660-61. I share his concern on this point—upstream filtering raises issues quite different from those discussed above. But I think that a compelled association approach to this concern may be more helpful than the attack on the public-private distinction that Lessig suggests. Under a compelled association approach, ratings systems supported by a PICS-enforcing statute would become more likely to be seen as “compelled” as they moved further upstream, because of market power and scope of end users covered. Admittedly, my approach relies upon a PICS-enforcing statute to create a nexus to the government. Then again, so do other analyses. See, e.g., Lessig, *supra* note 8.

189. See Internet Freedom and Child Protection Act of 1997, H.R. 774, 104th Cong. (1997); Family-Friendly Internet Access Act of 1997, H.R. 1180, 104th Cong. (1997).

190. See Safe Schools Internet Act of 1998, H.R. 3177, 104th Cong. (1998).

191. The Federal Government used a purchasing-type market-influencing technique to promote the development of key escrowed encryption technology.

indirectly—create a regime of content regulation on the net—what Congress may not (or may not want to) do directly. As such, they raise questions regarding how the doctrine of *unconstitutional conditions* would apply to the new media—and the new market—of cyberspace.

Put most simply, the doctrine of unconstitutional conditions forbids the government to grant a benefit on the condition that the recipient surrender a constitutional right, even if the government has the right to withhold the benefit altogether.¹⁹² Thus, the government may bar federally-funded family planning counselors from mentioning abortion in pregnancy counseling¹⁹³ but cannot selectively exempt some magazines from state taxation based on content.¹⁹⁴ The doctrine is commonly criticized by commentators as “riven with inconsistencies,”¹⁹⁵ although as a general principle it is often supported.¹⁹⁶ In this section, I will briefly consider three situations in which unconstitutional conditions are most likely to arise with respect to Internet content filters: subsidization, procurement, and taxation.

1. Conditioned Subsidization

One candidate for an unconstitutional conditions analysis is the government's provision of subsidies for Internet use (or speech) on the condition that the recipients install and/or use filtering software.¹⁹⁷ As an initial matter, identifying the particular claimant is important here. In one (not so hypothetical) version of the subsidization with strings issue, the government ties grants to public schools or libraries for improving their infrastructures with the requirement that filtering and blocking

See Michael Froomkin, *The Metaphor is the Key: Cryptography, the Clipper Chip, and the Constitution*, 143 U. PA. L. REV. 709, 769-772 (1995).

192. For excellent doctrinal and theoretical treatments of the issue, see David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675 (1992); Kathleen Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989); Richard Epstein, *The Supreme Court 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988).

193. See *Rust v. Sullivan*, 500 U.S. 173 (1991).

194. See *Arkansas Writers Project, Inc. v. Ragland*, 481 U.S. 221 (1987).

195. Sullivan, *supra* note 192, at 1416.

196. See *id.* at 1418-19; Epstein, *supra* note 192, at 15; Cole, *supra* note 192, at 681-82.

197. See, e.g., Sullivan, *supra* note 192, at 1419.

software be installed on the computers. Here, privity matters. Therefore, the "right" that is being pressured by the grants is something along the lines of an editorial right delegated to the local school and library boards, not a schoolchild's or library patron's right to receive information.¹⁹⁸ This editorial right is likely to have First Amendment status: school officials have long been recognized to have broad authority over the conduct of their schools;¹⁹⁹ and the editorial right has been fully recognized as a critical component of free expression.²⁰⁰ Arguably, a governmental requirement to filter and block certain material would constitute a burden on these rights.²⁰¹

Given the right and the (arguable) burden caused by the condition, would this subsidy-with-strings be upheld? In these types of cases, "the Court has attempted to . . . [distinguish] denials of benefits that operate as 'penalties' on speech from those that operate as mere 'nonsubsidies.'"²⁰² Essentially, the Court views some spheres of government activity as encompassing its role as the regulator and others as pertaining to its roles as manager or educator. In the first role, abridgements of speech are seen as suspect and given heightened scrutiny. In the second, only minimal scrutiny is required.²⁰³ This distinction materializes in the cases as follows: (1) the government may require some financial or physical segregation between

198. The Court has long recognized a right to receive information inherent in the First Amendment. *See, e.g.*, *Board of Educ. v. Pico*, 457 U.S. 853, 867-68 (1982). Note that the end users—who of course are not privy to the bargain—would still perhaps be able to bring a First Amendment challenge against the school or library on the basis of government-imposed filtering. *See supra* Part III.

199. *See, e.g.*, *Ambach v. Norwick*, 441 U.S. 68, 70, 81 (1979) (upholding a state statute forbidding teacher certification of non-citizens); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (noting that "the state may do much, go very far, indeed, in order to improve the quality of its citizens").

200. *See Miami Herald Co. v. Tornillo*, 418 U.S. 241, 256 (1974).

201. This assumes the "editorial" right is burdened enough to raise the un-constitutional conditions issue in the first place. It is plausible that the Court would not consider the "burden" placed upon the right—the alteration in local editorial control—to rise to the level required. It is well-recognized that the constitutional interest at issue must rise to the level of a right ordinarily protected by strict judicial review. *See Sullivan, supra* note 192, at 1427. So the operative question is whether, standing alone, the removal of some editorial control over Internet access by the Federal Government would gain strict review. In my view, it probably would, though it is not the clearest case.

202. GERALD GUNTHER & KATHLEEN SULLIVAN, *CONSTITUTIONAL LAW* 1318 (1997).

203. *See id.* at 1319.

speech conducted with public funds (which can be circumscribed) and that conducted with private funds; but (2) if "segregation" is not feasible, the government may not "leverage" its contribution requirements to effectively encompass private funds; and (3) it may not subsidize selectively on account of viewpoint discrimination.

Thus, if one assumes that the right of editorial selection is burdened by the imposition of filtering technologies, then a subsidy with strings is likely to be upheld unless the government attempts to leverage a relatively small grant into a broader regulatory power.²⁰⁴ The "leverage" case would arise under facts substantially similar to *FCC v. League of Women Voters*, for example, if Congress required that all schools and libraries receiving federal funds install and use filtering software on the computers that were connected to the net, even though the government grant was merely providing for the Internet connection, and private funds had purchased the computers. Assuming the right/burden scenario described above would be accepted by the Court, a "leveraged" requirement to filter is likely to be constitutional only if the funds with conditions attached could be separated from other funds; if the government funds purchased computers, then the software could be installed on them.²⁰⁵ Under the current unconstitutional conditions doctrine, it is unlikely that the "grant" of universal service assistance (low or no cost telecommunications services) would be allowed to result in the imposition of filtering technologies on computers purchased (or donated) with other funds.²⁰⁶

204. See *FCC v. League of Women Voters*, 468 U.S. 364 (1984).

205. See *Regan v. Taxation With Representation*, 461 U.S. 540 (1983).

206. An alternative approach that the Court might take would be in view of the prohibition on selective subsidization on the basis of viewpoint discrimination. See *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 831-837 (1995) (striking down a public university's refusal to support financially a religious student group on the basis of viewpoint discrimination). Assuming in this case that the Federal Government enforced filtering of sexual material, the "viewpoint" that would be discriminated against would probably be "sexuality," which is not among the range of viewpoints that ordinarily leaps to mind when considering viewpoint discrimination. But it's no more odd than the Court's invocation of "religion" as a viewpoint in *Rosenberger*.

2. Utilizing Procurement Power

Unconstitutional conditions might also be raised if the government used its procurement power to influence the market for Internet software in an attempt to bring about widespread filtering. In broad strokes, a challenger would argue that the government violates the unconstitutional conditions doctrine when it uses its market power to so alter the terrain upon which other speakers make choices as to effectively constrain those choices. Here I am thinking of two primary examples, although there are probably several others. The first is what I will call “opt-out influencing”: the Federal Government might purchase only web browser software that contained certain levels of filtering and blocking.²⁰⁷ Assuming that the government had enough purchasing power,²⁰⁸ this policy might influence browser manufacturers to standardize on this *opt-out* state, resulting in much broader use of filtering and blocking, and thus greatly incenting speaker-producers to rate their pages or be effectively invisible to a large portion of users. I call the second example “hyperlink influencing”: the Federal Government could refuse to provide or allow hyperlinks from any of its web pages to those pages that were not rated by a particular PICS-enabled rating system. I will consider the issues raised by each of these examples in turn.

a. Influencing the Code: Opt-Out Browser Software

The obstacles to challenging this form of government influence are formidable. The first is identifying a suitably-burdened right. While the “benefit” is relatively easy to identify—the purchase of software in the first instance or the establishment²⁰⁹ or allowance²¹⁰ of hyperlinks in the second—one must still decide whether the “right” that is being burdened is

207. It could also more simply require that any filtering and blocking options be turned “on” by default, a less extreme case that nonetheless might have similar market-influencing effects.

208. This is probably a stretch, but I would argue not wholly implausible. If the browser manufacturers were otherwise near indifference regarding the filtering and blocking features (say because of some significant consumer demand), then the addition of even some governmental purchasing influence might make a difference.

209. For a speaker-producer, hyperlinks from other pages are among the most valuable assets. Indeed, the provision of hyperlinks (usually via advertisements) is a foundation of the current commercialization of cyberspace.

210. See, e.g., *Link Law on the Internet: A Panel Discussion*, 38 IDEA 197 (1998).

one that would, if burdened directly, be subject to strict judicial scrutiny. In the "opt-out influencing" example, there are a few "rights" that might arguably be burdened.²¹¹ The first is the right of the software producer to produce software with whatever parameters it chooses—this First Amendment right of software writing has been asserted in some contexts, although it is not widely recognized.²¹² The second right that might be burdened is the right of the end user to effectively choose not to block certain content—either because of the difficulties in changing the default opt-out settings in the software or because the software is hard-wired for opt-out and cannot be changed. This argument would rest upon the well-recognized First Amendment right to receive information.²¹³ A third right that might be burdened is the right to be free from compelled speech as asserted by the speaker-producers whose choices of whether to rate are constrained by the increased use of filtering and blocking caused by the predominance of software with an opt-out state. Although the right against compelled speech is well-recognized, whether the "compulsion" of rating one's web pages rises to the constitutional level (or fails to) will depend in large part upon whether the arguments in Part IV(A)(1) above are accepted.

A second major issue raised by the "opt-out influencing" example is the relationship between unconstitutional conditions and *privity*. Unconstitutional conditions doctrine commonly assumes a bargained-for exchange: a benefit granted in exchange for the curtailment of a right.²¹⁴ In some cases, the

211. I ignore here the claims of federal employees, who may themselves have a claim under a right-to-receive information theory. See *United States v. National Treasury Employees Union*, 513 U.S. 454, 470 (1995) (noting the public's right to receive information); *Board of Educ. v. Pico*, 457 U.S. 853, 867 (1982) (describing the importance of the right to receive ideas). Obviously, this claim is not unique to this context.

212. For example, those challenging the Federal Government's restrictions on the export of encryption technology rely heavily upon the claim that computer software is speech. See *Bernstein v. Department of State*, 922 F. Supp. 1426, 1436 (N.D. Cal. 1996) (holding that cryptographic source code is speech). See generally R. Polk Wagner, *The Medium Is the Mistake: The Law of Software for the First Amendment*, 51 STAN. L. REV. 387 (1999).

213. See *Pico*, 457 U.S. at 867 (quoting Madison to emphasize the right's importance). For an excellent treatment of the right to receive information in the cyberspace context, see Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at 'Copyright Management' in Cyberspace*, 28 CONN. L. REV. 981 (1996).

214. See Epstein, *supra* note 192, at 7.

curtailment of the right will be so constitutionally suspect as to make the “bargain” itself unconstitutional.²¹⁵ But does the contractual analogy extend to a requirement of privity? That is, does the doctrine of unconstitutional conditions require at least a nominal bargaining relationship—privity—between the government and the recipient of the benefit? This issue is squarely raised by the opt-out influencing example described above: the rights of the end user to receive information and the speaker-producer to “not rate” were not burdened through any deal they cut with the government. To the extent that they are burdened, they are only burdened by the choices made by the software producer and the operation of the market. If privity is required to make an unconstitutional conditions claim—and I can find no case that suggests that it is not—then perhaps the doctrine doesn’t quite fit these circumstances.²¹⁶

b. Burdening the Hyperlink: Conditioning ‘Access’ to Government Pages

The hyperlink influencing case offers the chance to address more directly the unconstitutional conditions issue. Here, the burdened right is also the right against compelled speech, and privity is easily established: the government benefit is the hyperlink, either given or allowed, and the condition is that the speaker-producer rate her speech. I believe that this issue will turn largely on two questions: first, does the right to “not rate” rise to the level of that necessary to trigger the application of the unconstitutional conditions doctrine; and second, is the refusal to allow or provide hyperlinks a nonsubsidy of speech or a penalty for exercising the right to “not rate”?

In light of the discussion in Part IV(B)(2) above, we need not linger long on the first question, except to note that “the constitutional interest at issue must rise to the level of a recognized right—indeed, a *preferred* right normally protected by

215. See *id.* at 8.

216. This is obviously an area for further exploration. Without the application of unconstitutional conditions, I see no other avenue for the end users and speaker-producers to challenge the restraints on their expression—the public-private distinction is even stronger in this context (where the government is acting in its capacity as a purchaser rather than regulator) than in the compelled speech context noted above. Again, because the architecturalist view does not recognize the significance of the public-private distinction, it seems of no more help here than in the prior examples. See *supra* notes 165-66 and accompanying text.

strict judicial review."²¹⁷ Otherwise, the government could accomplish the end directly, without having to resort to indirect means. Therefore, if my conclusion that a compelled speech claim would not invalidate a government-imposed labeling requirement is correct, then the unconstitutional conditions claim is unsound as well.

The second question is, I believe, also easily disposed of. Given the apparent broad latitude that the Court has given the government in the subsidized speech context,²¹⁸ I believe that the refusal of hyperlinking is unlikely to be seen as significant enough to be characterized as a penalty. Given the huge numbers of web pages available, restrictions on linking to (or from) would seem a relatively slight burden. Indeed, following the logic of *Taxation With Representation*,²¹⁹ the speaker-producer desiring the government "subsidy" (the link) would simply have to restructure its web site: perhaps by creating a rated "intermediate" page that would be segregated from the remainder of the unrated content, or by linking to or from the government site via an intermediary web site.²²⁰ Given the low cost of such restructuring, courts would likely find that the government condition was permissible, even if the right to "not rate" is recognized as one of heightened constitutional significance.

3. Influencing via Taxation

Finally, conditioning tax exemptions for Internet speaker-producers on the labeling or rating of the speaker-producer's speech would raise a plausible unconstitutional conditions question. The Court has determined that Congress may not grant tax exemptions that discriminate among speakers on the basis of content²²¹ but that it may require that a recipient segregate activities as a condition of receipt of a government benefit.²²² Here, the right—to "not rate"—and the benefit—a government (tax) subsidy—are the same as the right and benefit discussed immediately above. Most pertinently, the

217. Sullivan, *supra* note 192, at 1427.

218. See, e.g., *Rust v. Sullivan*, 500 U.S. 173 (1991).

219. *Regan v. Taxation With Representation*, 461 U.S. 540 (1983).

220. See *id.* at 547-50.

221. See *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229-32 (1987).

222. See *Rust*, 500 U.S. at 197; *Taxation With Representation*, 461 U.S. at 544.

“restructuring” argument from the hyperlinking context is perhaps available here; indeed, this case looks even more like *Taxation With Representation*. This does provide an opportunity to explore the argument for unconstitutionality not noted above, although it may also apply in that context, that the refusal to grant the condition is impermissibly content-based.²²³ Because the government is basing the condition on whether the speaker-producer has labeled her speech, i.e., whether the label is present, the scheme might be said to be explicitly content-based. Viewed this way, the tax subsidy²²⁴ treats speaker-producers that do attach labels to their pages differently from those that do not. The criticism of this point, however, is that the labeling requirement is not *really* content-based—it is wholly neutral regarding the underlying content of the speech, it just discriminates according to whether an invisible label is attached, and is indifferent even to the content of that label. This argument is essentially the same one discussed above in Part IV(A)(1)(b). And, as I argued there, the slight burden that the labeling requirement imposes will ultimately lead the Court to decide that such restrictions are content-neutral rather than content-based.

The doctrine of unconstitutional conditions, because it addresses the sort of indirect market-influencing activity that Congress may well consider in the Internet regulation context, is a useful field for further exploration of these issues. Significantly, however, it does not seem at this time to be able to address the broader range of possible market-based influences that may result from government activities. In particular, the theories of privity and market coercion raise difficult questions for the application of the unconstitutional conditions doctrine to these issues.

C. IN THE SHADOW OF REGULATION: ACTS, NON-ACTS, AND STATE ACTION

It is generally believed that some form of overt government action is needed to raise constitutional issues—government advocacy, suggestions, and perhaps even threats or bullying do

223. See *Arkansas Writers' Project*, 481 U.S. at 233 (applying strict scrutiny to the selective application of a sales tax to magazines and holding the tax unconstitutional).

224. Though it would seem to apply as well to the hyperlinking issue.

not typically raise such questions.²²⁵ Thus, the range of permissible government activities that involve what might be called the shadow of regulation are quite broad and may be increasingly likely avenues that the Federal Government will pursue in its attempt to regulate Internet content.²²⁶ The interesting question in this context is where the "shadow" ends. That is, where is the "line" that the government cannot cross without enabling Constitutional claims against itself.

Several commentators have suggested that the current issues regarding PICS and Internet content filters bear some resemblance to the "V-Chip" intended to enable future content regulation of broadcast and cable television.²²⁷ In the V-Chip context, the government has already acted: provisions in the Telecommunications Act of 1996 will soon require all television sets sold in the United States to contain the means to filter and block programming.²²⁸ It is not my purpose to explore the constitutionality of the V-Chip rating and filtering system here. Rather, I want to point out that the rating system that is (or indeed, has been) voluntarily introduced by the broadcasters may raise similar state action issues to the Internet filtering context.

Section 551 of the Telecommunications Act of 1996 outlines a publicly-supported but privately-implemented system for rating the content of television shows. The Act requires that distributors of such programming establish and implement "voluntary rules" for rating content and broadcast such ratings with the shows²²⁹—a system that eventually developed and has been implemented. If such a system had not developed, the FCC was authorized to form an advisory committee to issue guidelines and recommend procedures, as well as to promulgate rules requiring the transmission of ratings if they existed.²³⁰ For our purposes, an interesting question is whether such a scheme constitutes state action. The ready answer, of course, is that it unquestionably does: the government

225. See, e.g., *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991); *TRIBE*, *supra* note 81, § 12-4; LAURENCE H. TRIBE, *CONSTITUTIONAL CHOICES* 246-48 (1985) [hereinafter *TRIBE, CONSTITUTIONAL CHOICES*].

226. See, e.g., President's Remarks, *supra* note 2.

227. See Lessig, *supra* note 8, at 642; Matthew L. Spitzer, *An Introduction to the Law and Economics of the V-Chip*, 15 *CARDOZO ARTS & ENT. L.J.* 429, 433 n.12 (1997).

228. Pub. L. No. 104-104, § 551(c), 110 Stat. 56, 141 (1996).

229. See *id.* § 551(e).

230. See *id.* § 551(b).

actually requires the V-Chip, for example. But what claims arise from the state action? In order for a speaker-producer to bring a cognizable First Amendment claim, she will have to show how a state action directly—or, perhaps in the case of unconstitutional conditions, indirectly—burdened her rights to free expression.

In this sense it is important to note the distinct-but-related nature of the state action and unconstitutional conditions doctrine. The state action requirement tells us where the “zones” of private and public behavior meet and, ideally at least, tells us where the line is drawn.²³¹ The unconstitutional conditions doctrine appears to in large measure take up where the state action doctrine leaves off: addressing situations where the government is plainly acting but perhaps is attempting to do something indirectly that it may not do directly.²³² The two may not quite meet in the middle—for example, I cannot think of how to overcome the lack of state action with respect to the end user in the opt-out influencing hypothetical described above, yet the apparent requirement for privity makes the unconstitutional conditions doctrine also inapplicable.²³³ What doctrine will apply (if any) will depend upon the nature and direction of the claim; carefully analyzing the difference between the two theories will strengthen the underlying determination.

For example, if the broadcaster of a television show wishes to bring a “right not to rate” claim under the current self-labeling scheme, she is unlikely to successfully argue that the labeling “requirement” itself is state action.²³⁴ A more fruitful

231. See *TRIBE, CONSTITUTIONAL CHOICES*, *supra* note 225, at 246.

232. See Sullivan, *supra* note 192, at 1415.

233. See *supra* note 214-216 and accompanying text.

234. On this conclusion I differ with the analysis conducted by Professor Spitzer. He notes four reasons that he believes state action is present in the V-Chip case: (1) Congressional suggestions that the governmental grant of digital bandwidth be tied to a system of content rating; (2) requiring the V-Chip in the television set itself; (3) governmental threats, advocacy, and review of the system; and (4) the requirement that ratings be transmitted if they exist. See Spitzer, *supra* note 227, at 433-51.

Factors (1), (2), and (4), however, seem more appropriately analyzed under the unconstitutional conditions doctrine than under state action. In these three cases, state action unquestionably exists (I'm assuming that (1) was actually legislated—it is simply irrelevant if it was not); the task now is to show *how* the state action impermissibly forces the distributor to label her show. For example, if the Congress conditioned the grant of additional spectrum on the imposition of ratings, then the question is not simply whether the government acted to burden a right, but whether this constitutes an *impermissi-*

avenue of pursuit might be to claim that the labeling requirement was a result of an unconstitutional conditions bargain—Professor Spitzer notes that the Federal Government was considering using the allocation of new digital spectrum as a “carrot” to force content rating. By focusing on the state action that *is* present, i.e., the labeling requirement, rather than downplaying the specific action required to label, a challenger may be able to bring the claim more successfully.

CONCLUSION

The relationship between filters and the First Amendment might be said to be an uneasy one. The rapidly-changing technology and its relationship to the law puts not insignificant pressure on current doctrinal concepts; traversing this path is difficult, and analytical obstacles abound. Yet the journey is worth the effort—a solid footing on technological and doctrinal foundations will provide the best support for future development in this area.

The direct approach to the technology and doctrine followed in this essay yields the conclusion that most of the government’s indirect attempts to establish or support a PICS-enabled filtering regime would be constitutional. This conclusion offers cautions to friends and foes of increased governmental regulation alike, however. A common thread running

ble burden on First Amendment rights—an impermissible bargain. Similarly, requiring the V-Chip in TV sets is itself a clear governmental act—the question is whether the act conditions access to those television sets upon the use of a ratings system. A very analogous analysis would exist for factor (4). The question of the relationship between an existing government act and a burdened right is one for unconstitutional conditions rather than state action.

Factor (3), however, raises questions of state action, but appears to fall far short of the level of “action” required: the “entanglement” principle that Spitzer relies upon in his analysis, *see id.* at 439, is more properly viewed through what Professor Tribe calls the “close-up lens” form of analysis. *TRIBE, CONSTITUTIONAL CHOICES, supra* note 225, at 248. This lens looks at the nexus between a state activity and the person or entity who might be blamed. *See id.* It is not a theory of coercion. *Cf. Spitzer, supra* note 227, at 442 (“[T]he drafting of both the present ratings and brawnier new system was as voluntary as facing a firing squad.”) (quoting Howard Rosenberg, *Holdout by NBC to Provide Real Test*, L.A. TIMES, July 30, 1997, at F1). The nexus to an actual state regulation is a necessary element of the “close-up lens” analysis. *See TRIBE, CONSTITUTIONAL CHOICES, supra* note 225, at 250. Reducing state action to “pressure from President Clinton, threats from congressmen,” *see Spitzer, supra* note 227, at 444, or even the non-binding recommendations of the FCC would go a long way toward making the requirement for state action meaningless.

through the analyses is the importance of the public-private distinction. And, while the distinction may in some cases aid the government in indirectly supporting private regulation of content, an important basis of that conclusion is the continued existence of robust choices for the end user and speaker-producer.

Finally, the conclusion that many of the government's activities with respect to filters and the First Amendment only highlight the importance of the political and legislative processes in resolving these issues. Although the architecture of PICS allows myriad private choices to influence the state of the Internet, there is still a significant role for the government—especially the legislative and executive branches—in helping to shape the architecture itself. Those who believe that PICS and other filtering technologies are going to be ultimately detrimental to expression are well advised to focus their efforts on creating a politics of filters as well as a new constitutional doctrine; it may be that the expansive protection from even private content regulation that they seek will be found in the Congress rather than the courts.

