

Speech and Institutional Choice

Thomas B. Nachbar*

I. DIGITAL TECHNOLOGY AND REGULATION

The digital world presents many interesting questions, but one question it does not present is whether it should be regulated. Whether digital technology, either in the form of the Internet or as stand-alone or otherwise-networked devices, should be regulated misleadingly implies that regulation is actually a choice. Because its contours are completely and totally defined by humans, digital technology cannot help but be regulated down to its slightest detail. Nor is the regulation of digital technology coming in some distant future. It's here and it is as complete today as it is ever going to be.

Particular regulations may be problematic or imperfect in relation to their goals, but because humans define digital technology, its regulation is axiomatically absolute. This point is lost on practically no one, at least not since the late 1990s, when the wave of irrational exuberance displayed by the Internet's first admirers in the legal academy broke on the shores of reality and receded back into the sea.¹ Of course, in this human-defined place, states will insist on certain controls on speech, controls that will vary based on the state's dominant political or social culture. It has always been folly to believe that authoritarian governments accustomed to controlling information would cede control over so precious a resource without a fight, or that they would be completely ineffective in doing so.

Even if an authoritarian state cannot successfully control all of the conduits by which information crosses its borders, successfully targeting a few of the largest ones is likely to bring enough of a return

* Associate Professor of Law, University of Virginia. This paper was presented at the *Rehnquist Court and the First Amendment* conference hosted by the Washington University *Journal of Law & Policy* in St. Louis, Missouri, on November 18, 2005.

1. See Tim Wu, *When Law and the Internet First Met*, 3 GREEN BAG 2D 171 (2000).

to justify the effort, a point at the heart of John Palfrey and Robert Rogoyski's Article for this conference.² What is true of states and regulation for political gain will be true of private interests and regulation for financial gain. Control over the means of creating and sharing the digital content would provide any firm substantial rents, either in the form of higher prices or by favoring its own content or associated technologies.³ The pervasive presence of network effects—both actual and virtual—in digital technology markets suggests that such private actors are likely to enjoy considerable regulatory control over particular technologies once dominated,⁴ and there is every reason to believe that such control, once vested, will be employed to the benefit of those who hold control and to the detriment (or, at the very best, indifference) of those who do not. The likely result is both wealth transfer to those who control particular digital technologies and, as a consequence of their vested interest in maintaining that control, the retardation of future technological development.⁵

2. See John Palfrey, Jr., & Robert Rogoyski, *The Move to the Middle: The Enduring Threat of "Harmful" Speech to the End-to-End Principle*, 21 WASH. U. J.L. & POL'Y 31 (2006); see also LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* 207–08 (1999). A major source of informal discussion among my co-panelists was a (then-)developing story about the use of web censorship in Tunisia, which was at that time hosting the World Summit on the Information Society, a worldwide conference of governments, business, and NGOs to discuss Internet governance issues. See Victoria Shannon, *Tunis Chided over Web Censorship*, INTL. HERALD TRIB., Nov. 17, 2005, at 1R. More recently, China has succeeded in getting Google and other Internet services to assist it in controlling the flow of information across China's borders, complicity that has subjected the companies to potentially contradictory scrutiny by a government with a competing claim to their obedience, the United States. See generally Tom Zeller, Jr., *Web Firms Questioned on Dealings in China*, N.Y. TIMES, Feb. 16, 2006, at C1.

3. Microsoft, for instance, attempted to use its operating system monopoly to dominate the market for Internet browsers, a move that was designed in-turn to protect it from a challenge to its monopoly in operating systems. See *United States v. Microsoft Corp.*, 253 F.3d 34, 95–96 (D.C. Cir. 2001); Jim Speta, *Maintaining Competition in Information Platforms: Vertical Restrictions in Emerging Telecommunications Markets*, 1 J. TELECOMM. & HIGH TECH. L. 185, 186–87 (2002).

4. See Mark A. Lemley, *Antitrust and the Internet Standardization Problem*, 28 CONN. L. REV. 1041, 1045–52 (1996).

5. LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* 67 (1st ed. 2001).

II. THE POLITICS OF TECHNOLOGY

Regulation by technology has always been a necessary part of the digital landscape, and regulation by law—whether perceived as harmful to individual freedoms or as a salutary check on overreaching by market participants—will only increase. Thus, it is only natural that legal academics have devoted considerable attention to matters of digital technology in the past ten years. The work generated by legal academics in the field—in both technology policy broadly and the Internet specifically—can be divided roughly into two categories: attempts to hash out applications of particular regulatory agendas to digital technology (such as the significance of copyright law or First Amendment doctrine to the Internet or to the development of new digital technologies);⁶ and arguments that a particular set of values should underlie and define that inevitable regulation.⁷ Some work, of course, runs the gamut.⁸

Most of this work is both necessary and important, but its technological focus has frequently caused its authors to largely ignore a more general quality of any rule that defines how most humans will respond to it: the identity of the rule's author. In their emphasis on coming up with the “right” substance or values for Internet regulation, many have ignored the question of the regulation's origin.⁹ It's a surprising omission, since one of the earliest

6. See, e.g., LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* (2004); Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 *YALE L.J.* 1757 (1995); Philip J. Weiser, *The Internet, Innovation, and Intellectual Property Policy*, 103 *COLUM. L. REV.* 534 (2003).

7. See, e.g., LESSIG, *THE FUTURE OF IDEAS*, *supra* note 5; Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 *N.Y.U. L. REV.* 1 (2004); Mark A. Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 *UCLA L. REV.* 925 (2001); Jonathan Zittrain, *The Generative Internet*, 119 *HARV. L. REV.* 1974 (2006).

8. LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE*, *supra* note 2.

9. Many but certainly not all. See JACK GOLDSMITH & TIM WU, *WHO CONTROLS THE INTERNET?* 153 (2006) (arguing for political legitimacy as the basis for relying on nation-states to regulate the Internet). A substantial amount of work has also been done by some, including my co-panelist John Palfrey, on the problem of who should control the root name directories for the Internet and the various problems presented by the vesting of that authority in a U.S.-dominated agency, the Internet Corporation for Assigned Names and Numbers (ICANN). See, e.g., A. Michael Froomkin & Mark A. Lemley, *ICANN and Antitrust*, 2003 *U. ILL. L. REV.* 1; John Palfrey, *The End of the Experiment: How ICANN's Foray into Global Internet Democracy*

proponents of the value lauded by so many who write in this field—“openness”—justified it on its power to prevent capture of the architecture of the Internet by a particular class of (corporate) actors.¹⁰ What started as an architectural preference intended to prevent private control over what are inherently political decisions has become an architecture that lacks any particular claim to politics at all.

While many have nominated particular values for codification in the design and regulation of digital technology, few have discussed how to make those who choose those values or the regulation implementing them politically legitimate. Most simply ignore the question of source, but even those who do not rarely argue for a political organization to set technical, and hence regulatory, policy for the Internet. My co-panelist, Jonathan Zittrain, for instance, has elsewhere proposed “a 21st century international Manhattan Project which brings together people of good faith in government, academia, and the private sector for the purpose of shoring up the miraculous information technology grid” that is the Internet.¹¹ This is, as an initial matter, an odd example; although the actual Manhattan Project was collaborative, it was a decidedly top-down affair, controlled so tightly by a single, dominant entity (the United States government) that it was conducted under the strictest possible secrecy.¹² The

Failed, 17 HARV. J.L. & TECH. 409 (2004). Much of this work has been quite good and the topic is certainly important, but it is critical to remember that ICANN does not set policy that alters the technical nature of the Internet; it only allocates the names that are used on the Internet. ICANN’s power is significant, but it is not definitional of the Internet in the same way that the Internet Engineering Task Force’s standard-setting role is.

10. See LESSIG, CODE AND OTHER LAWS OF CYBERSPACE, *supra* note 2, at 207.

We are entering a very different world where code is written within companies. . . . We are entering a world in which code is corporate in a commercial sense, and leaving a world in which code is was corporate in a very different sense.

To the extent that this code is law, to the extent that it is a chosen structure of constraint, we should worry about how it is structured and whose interests may define its constraint, just as we worry when any lawmaking power is assumed by a private body. If code is law, who are the lawmakers? What values are being embedded into the code?

Id.

11. Jonathan Zittrain, *Without a Net*, LEGAL AFF., Jan./Feb. 2006, at 33, 38.

12. LESLIE GROVES, NOW IT CAN BE TOLD: THE STORY OF THE MANHATTAN PROJECT (1962).

Manhattan Project was not “free” or “open” in any sense of those words.

More importantly, though, the image of the Manhattan Project’s convergence of great minds to work together in isolation suggests that solving the Internet’s problems is best done without too much interference from traditional regulatory (and therefore inherently political) institutions. The call for isolated consideration of the Internet’s architecture is inconsistent with the realization that, for the Internet, technology and policy are inseparable; defining technology is defining policy. Policy should be set by political bodies, but most who have written on this topic have either argued for apolitical technocratic administration of the Internet,¹³ or have assessed potential regulators not by their political qualifications but rather by the values they represent and the substance of the rules they will likely impose.¹⁴

But most common understandings about what makes a rule legitimate focus not on the content of the rule, but rather on its source.¹⁵ When the rules that govern the Internet are widely understood to govern human behavior as well, people will become concerned with who is making those rules, and when that happens,

13. *E.g.*, Kofi Annan, *The U.N. Isn’t a Threat to the Net*, WASH. POST, Nov. 5, 2005, at A19 (“All say that the day-to-day management of the Internet should be left to technical institutions, not least to shield it from the heat of day-to-day politics.”).

14. *E.g.*, LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE*, *supra* note 2, at 207 (suggesting that the identity of Internet code writers is important, but justifying his preference for the IETF based on its members’ preference for producing “no more than code that would work,” not on their political legitimacy as regulators); John G. Palfrey, Jr. & Robert Rogoyski, *The Move to the Middle: The Enduring Threat of “Harmful” Speech to the End-to-End Principle*, 21 WASH. U. J.L. & POL’Y 31 (2006); Lawrence B. Solum & Minn Chung, *The Layers Principle: Internet Architecture and the Law*, 79 NOTRE DAME L. REV. 815, 876 (2004) (arguing for a layered approach to Internet governance that mirrors the technical layers of the Internet, because doing so will help to maintain “a transparent Internet”). Another possibility would be to focus on neither substance nor the identity of the originator, but on the correct *process* for making rules. Thus, Michael Fromkin suggests that the legitimacy of the IETF’s authority rests on the extended and robust discourse in which it engages in setting those rules (a process so unconcerned with origins that its participants are entirely self-selected). *See* A. Michael Fromkin, *Habermas@discourse.net: Toward a Critical Theory of Cyberspace*, 116 HARV. L. REV. 749 (2003). The necessary procedures for securing the legitimacy of laws, on the other hand, has never been so highly specified (unlike the highly specified procedures for selecting lawmakers).

15. At least in easy cases, and most rules likely to govern through technology are going to be easy cases. *See generally* H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994).

the issue of Internet governance will become a live one. We are seeing the first disputes right now. For example, the Internet Corporation for Assigned Names and Numbers (ICANN) dictates who may use which domain names (or, more importantly, who may use which top-level domains, such as “.com,” “.us,” and “.ru”) by virtue of a contract with the United States Department of Commerce.¹⁶ Those who do not consider the Department of Commerce (or the United States, for that matter) a legitimate source of regulation (such as the government of the country represented by the “.ru” top-level domain) may find American control over domain naming problematic, and understandably so. Popular recognition of the regulatory force of Internet technology will necessarily precipitate a political battle over which *institutions* should define the Internet’s technological landscape. The same is likely to be true for the regulation of other digital technologies, such as digital rights management (DRM), that have the potential to control what content we have access to and how we experience that access.¹⁷

The greatest beneficiary of the current policy-focused approach to evaluating network regulators has been the end-to-end concept of network design and its current guardian on the Internet, the Internet Engineering Task Force (IETF). End-to-end dictates that a network should interfere as little as possible with the content it carries—it should provide carriage only, giving as much freedom as possible to the “ends” of the network to share information in the way they find most useful.¹⁸ The concept has been given reality on the Internet, dominating the protocols that control how the Internet operates,¹⁹ and its appeal among Internet activists is near universal.²⁰

End-to-end may have many technological and philosophical merits, but its regulatory pedigree is not one of them. End-to-end’s

16. On ICANN and its relationship with the U.S. Department of Commerce, see MILTON MUELLER, *RULING THE ROOT* (2002).

17. See Dan L. Burk, *Legal and Technical Standards in Digital Rights Management Technology*, 74 *FORDHAM L. REV.* 537, 539 (2005).

18. See J.H. Saltzer, D.P. Reed & D.D. Clark, *End-to-End Arguments in Systems Design*, *ACM TRANSACTIONS IN COMPUTER SYSTEMS* 277–88 (1984).

19. Lemley & Lessig, *supra* note 7, at 930–32.

20. See LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE*, *supra* note 2, at 207; Lemley & Lessig, *supra* note 7, at 932–33; Palfrey & Rogoyski, *supra* note 14.

implementation on the Internet has been the product of a “rough consensus” (as all consensus must be) among the self-appointed members of the IETF;²¹ put another way, end-to-end dominates the Internet because it is the only networking standard that has achieved consensus among Internet engineers active in the standard-setting process. That’s not exactly a mark in its favor. The use of consensus to define the Internet’s technology should give pause to anyone who recognizes the necessary overlap between defining the Internet’s technological shape and defining its political shape. The poor suitability of consensus as a policymaking device for large groups of people with widely divergent interests is self-evident (the oft-raised problems of public choice endemic in representative governments pale in comparison). Certainly, most Internet users would be surprised to learn that the way the Internet works is defined by a group of technophiles whose only motivation to serve is the strength of their own beliefs (and perhaps interests). I doubt that surprise would be a happy one.

III. THE REHNQUIST COURT AND INSTITUTIONAL CHOICE

The work of courts, unlike that of commentators, is inherently tied to the institutions of regulation. Courts often mediate between institutional actors, frequently deciding not the substance of policy in the first instance, but rather allocating policymaking authority among competing institutions. No Court in recent history has been more conscious of its role in allocating power among regulatory actors than the Rehnquist Court, a consciousness displayed in particular in its revitalization of the limits imposed by federalism.²² First Amendment

21. See INTERNET ENG’G TASK FORCE, TAO OF THE IETF: A NOVICE’S GUIDE TO THE INTERNET ENGINEERING TASK FORCE (2001), available at <http://www.ietf.org/tao.html>, for a description of the IETF’s decisionmaking process; see also Susan P. Crawford, *The ICANN Experiment*, 12 CARDOZO J. INT’L & COMP. L. 409, 438 (2004) (“The idea that ‘who shows up’ may be taken as a representative sample of the rest of the world” underlies the organization of both ICANN and the IETF); Froomkin, *supra* note 14, at 757.

22. See *United States v. Morrison*, 529 U.S. 598, 627 (2000) (striking a federal statute, but explaining that a state would have the power to promulgate the same law); cf. *New York v. United States*, 505 U.S. 144, 166 (1992) (“We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.”); see also John O. McGinnis, *Reviving Tocqueville’s America: The Rehnquist Court’s Jurisprudence of*

caselaw nominally pertains not to debates over constitutional “structure,” but rather to those over “rights,” but even in an area dominated by concern over individual freedoms, the Rehnquist Court has frequently decided free speech cases on institutional, rather than solely libertarian, grounds.

Perhaps the most telling example of an institutional First Amendment is the plurality opinion in *Denver Area Educational Television Consortium, Inc. v. FCC*.²³ In *Denver Area*, the Court confronted two provisions of the Cable Television Consumer Protection and Competition Act of 1992 that granted permissive authority to cable operators to block “patently offensive and indecent content” on certain channels.²⁴ One provision (section 10(a)) authorized blocking on so-called “leased access channels,” channels reserved for lease by commercial entities unaffiliated with the cable operator.²⁵ A second provision (section 10(c)) authorized blocking on “public access” channels, channels whose content is determined by the local municipality, either directly or by its designee.²⁶ Sections 10(a) and 10(c) granted cable operators identical discretion to control ostensibly identical content, yet the Court found section 10(a) constitutional but section 10(c) not.²⁷ Four of the justices found that their regulation of identical content rendered sections 10(a) and 10(c) constitutionally indistinguishable;²⁸ those that did not necessarily found the difference between these provisions not in the relative

Social Discovery, 90 CAL. L. REV. 485, 491–92 (2002) (recognizing the institutional implications of the Court’s federalism jurisprudence, but ascribing it to a considered policy of imposing fewer restrictions on individuals).

23. 518 U.S. 727 (1996).

24. Pub. L. No. 102-385, 106 Stat. 1460, 1486 § 10(a), (c) (1992) (codified in scattered sections of 47 U.S.C.).

25. *Id.* § 10(a) (codified at 47 U.S.C. § 532(h)).

26. *Id.* § 10(c) (implemented by 47 CFR § 76.702 (1995)). See *Denver Area*, 518 U.S. at 760–61. The Court also considered a provision that *required* cable operators to segregate certain “patently offensive” or indecent content to particular channels, and to block those channels to all subscribers who did not request access. *Id.* at 753–60. The Court analyzed that mandatory provision using typical content-based speech analysis, and, in the only part of the opinion gaining a majority of votes, struck it for its failure to satisfy the least-restrictive-means test applied to all content-based speech regulations. *Id.*

27. *Denver Area*, 518 U.S. at 765 (plurality opinion); *id.* at 774 (Stevens, J., concurring).

28. *Id.* at 779–80 (O’Connor, J., concurring in part and dissenting in part); *id.* at 826–31 (Thomas, J., concurring in part and dissenting in part) (rejecting the only argument for distinguishing § 10(a) and 10(c), that “public access” channels are public fora).

value or potential harm of the content being blocked, but rather in the relative institutional claims to control the content carried on the different types of channels.

The plurality opinion was written by Justice Breyer, who found section 10(a) constitutional on largely substantive grounds by comparing the restriction to a constitutionally permissible ban on indecent content and finding it less restrictive.²⁹ Of course, exactly the same substantive rationale could have applied to the blocking of public access channels authorized by section 10(c), but in his discussion of that provision, Justice Breyer practically ignored substantive standards for speech regulation, and instead pitted the interests of the quasi-public bodies that make programming decisions for public access channels against the potential “veto” of the cable operator.³⁰ Although cable operators carry an identical power relative to lessees of leased access channels, it was only in the context of public access that Justice Breyer found a real threat of posed by erroneous use of the veto against “borderline” content, a “threat [that] must bulk large within a system that already has publicly accountable systems for maintaining responsible programs.”³¹

Most free-speech cases do not present such stark institutional choices. Instead, they raise questions that go to the substance of the regulation and its validity in light of traditional, familiar free-speech tests, such as whether a particular regulation is supported by a sufficient government interest and, if so, whether the statute is sufficiently closely tailored to survive First Amendment review.³² But many free speech cases do present institutional dimensions, and the Court has been ready and willing to engage those institutional questions over the last two decades.

29. *Id.* at 743–47.

30. *Id.* at 763.

31. *Id.* In fairness, Justice Breyer was able to raise only three votes (including his own) in support of his analysis. Justice Kennedy’s concurrence (joined by Justice Ginsburg) would have decided the case by designating public access channels as public fora and finding § 10(c) to be an unconstitutional content-based restriction on those fora. *Id.* at 793 (Kennedy, J., concurring in part and dissenting in part).

32. *E.g.*, *Ashcroft v. ACLU*, 542 U.S. 656 (2004) (striking down a federal anti-pornography statute on the basis that filtering would be a less restrictive means of shielding children from indecent material).

Take, for example, both *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*³³ and *Boy Scouts of America v. Dale*.³⁴ Both cases involved the use of state anti-discrimination laws to prevent the exclusion of individuals from private organizations on the basis of their sexual orientation. In *Hurley*, the access sought was to the privately organized Boston St. Patrick's Day Parade; in *Dale*, it was access to a position as an Assistant Scoutmaster for the Boy Scouts of America.³⁵ The Court held in both cases that the groups' constitutional rights of association prohibited the use of state anti-discrimination laws to require access.³⁶

*United States v. American Library Ass'n, Inc.*³⁷ also dealt with the roles of institutional actors, albeit not as a matter of direct conflict, as in *Hurley* and *Dale*. *American Library Ass'n* addressed the constitutionality of the Children's Internet Protection Act (CIPA),³⁸ which requires libraries to install Internet filtering software on all computers used by patrons as a condition of receiving federal subsidies for Internet access.³⁹ The Court held that the burden imposed by the statute on library patrons was substantially reduced by the fact that libraries have traditionally exercised substantial discretion in deciding what materials to make available to the public. Given this, it was permissible for Congress to piggyback the CIPA filters on the libraries' institutional role as mediators of information to further the (ostensibly permissible) statutory objective of limiting children's access to indecent content.⁴⁰

Cases like *Dale* and *Hurley* could be viewed simply as cases about the constitutional reach of state anti-discrimination laws; it was only by recognizing the institutional interests of entities such as the Boy

33. 515 U.S. 557 (1995).

34. 530 U.S. 640 (2000).

35. *Id.* at 644–45; *Hurley*, 515 U.S. at 561. Actually, the access in *Hurley* was not denied based on the sexual orientation of the marchers, but on their message. The organizers of the parade disclaimed any intent to disqualify marchers based on their sexual orientation, nor did any of the marchers that were denied access claim they were excluded on that basis. *Hurley*, 515 U.S. at 572.

36. *Dale*, 530 U.S. at 652–53; *Hurley*, 515 U.S. at 573.

37. 539 U.S. 194 (2003).

38. Pub. L. No. 106-554 tit. XVII, 114 Stat. 2763A, 335 (2000).

39. *American Library Ass'n*, 539 U.S. at 201.

40. *Id.* at 207–08 (plurality opinion); *id.* at 217 (Breyer, J., concurring).

Scouts and the organizers of the Boston St. Patrick's Day Parade that the Court found a serious (and indeed overwhelming) constitutional interest to challenge state control.⁴¹ In *American Library Ass'n*, the Court recognized the importance of institutional actors in a very different way, relying on the institutional role of libraries as information intermediaries in order to uphold the constitutionality of a federal statute restricting access to speech.

I do not mean to suggest that the Court (or at least the *Denver Area* plurality) was particularly prescient in recognizing the potential for private actors to exercise what is effectively regulatory control, nor am I claiming a new theory of constitutional interpretation that seeks to re-envision all speech regulations as matters of institutional choice. Rather, my claim is a modest one—that the Rehnquist Court has been quick to recognize the institutional dimensions of speech regulation, a propensity that is of a piece with its larger enterprise of carefully identifying the boundaries between various members of the regulatory universe. As we choose the institutions that define the Internet and other digital technologies, we would do well to take a page from the Rehnquist Court's understanding of the roles of competing institutions and institutional choice apart from our policy preferences as to the substantive and technical values that regulators are likely to include in their chosen brand of regulation.

To say that we should take the roles of regulatory institutions seriously is not necessarily to say that those who define our digital universe should be subject to some form of higher legal scrutiny; Supreme Court jurisprudence again provides valuable guidance. The Court has been correct to resist the temptation to narrow the state action requirement in First Amendment cases, with cases like *Marsh v. Alabama*⁴² rightly serving as the exception, rather than the rule. It is only when a private entity actually acts as a regulator that it merits some sort of higher scrutiny for assuming a regulatory, rather than a participatory, role. The similarity between the privately owned “company town” in *Marsh* and “any other American town” was a

41. See also McGinnis, *supra* note 22, at 492–93 (arguing that the “Rehnquist Court has bolstered the autonomy of mediating institutions, particularly civil associations, against government power,” and citing *Dale* as an example).

42. 326 U.S. 501 (1946).

point the Court made several times in *Marsh* itself.⁴³ It is the institutional role served by an actor, not its legal form, that should drive the analysis. It may have been fairly straightforward to identify who was a regulator and who was a mere property owner in the age of *Marsh*; it will become increasingly difficult to do so when the terrain changes from one of real property rights and anti-leafleting rules, to one of defining the form of the protocols over which our email will (or will not) be carried.

Of course, identifying a speech interest that is implicated by private regulatory conduct does not suggest any particular response. My analysis does not suggest that the actions of private technology standard setters are subject to First Amendment review. In *Denver Area*, the challenge was to regulatory action by the FCC, not by a cable operator. Even in *Marsh*, First Amendment review by courts did not come into play until the defendant was cited by a state-actor sheriff's deputy and convicted by a state court for violation of a state statute.⁴⁴ The analysis does, however, suggest that when private entities act like regulators in their own right, government has considerably more leeway to interfere than in the case of an unambiguously private entity whose business less closely resembles the business of governing. *Marsh* suggests directly applying constitutional limits to private actors, but cases testing the state's power to impose such obligations by statute are much more common. Increased deference to private entities acting in a quasi-regulatory capacity is the lesson of *Pruneyard Shopping Center v. Robbins*,⁴⁵ the doctrinal precursor to *Hurley* and *Dale*, which held not that the First Amendment independently required a private entity (a shopping center) to provide a forum for speech, but rather that, given the conflicting interests at stake, the state had the discretion do so.⁴⁶ Legislatures, rather than the First Amendment, are our primary line of protection against private regulators.

43. *Id.* at 502, 503.

44. *Id.* at 503–04.

45. 447 U.S. 74 (1980).

46. *Id.* at 81; *see also* *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386 (1969) (upholding the “fairness doctrine,” which required broadcasters to devote free time to responses to editorializing because of the “fiduciary” obligations a broadcaster undertakes by virtue of their privileged status as an FCC licensee).

The Rehnquist Court's First Amendment jurisprudence has much to offer in resolving the many problems presented by digital technologies and the Internet, but it may very well be that the Rehnquist Court's greatest contribution is not any of its substantive constitutional rules of free speech, but rather its willingness to both recognize the significance of institutions and to explicitly factor respective institutional roles into constitutional analysis.

Over the last decade, several First Amendment cases have presented the Court not with a choice over whether there will be speech, but rather with a choice over what institution should have the discretion to decide what speech will take place. The Court has been quick to recognize the institutional interests at play in such cases, and so should we. We face the same institutional choices when we consider new technologies whose widespread acceptance will occur through non-market methods or will otherwise effectively regulate how we use digital technologies, including the Internet, even if the necessity of choosing between competing institutions is not presented as plainly as it was in cases like *Denver Area*, *Hurley*, and *Dale*.

IV. CONCLUSION

Recognizing that those who define the *technical* shape of technologies like the Internet also define their *political* shape requires that we take a page from the Rehnquist Court's institutional approach to resolving questions of regulatory control. Just as we would not delegate policymaking to a group of unaccountable philosopher kings, we should blanch at the thought of allowing apolitical institutions to define the technologies that promise to regulate our lives as completely as the Internet will, even if we happen to agree with their particular platform of control.