University of Colorado Law Review

Volume 71
Issue 4 *SYMPOSIUM OVERVIEW*

Article 11

Fall 2000

Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to "Private" Regulation

Paul Schiff Berman

CYBERSPACE AND THE STATE ACTION DEBATE: THE CULTURAL VALUE OF APPLYING CONSTITUTIONAL NORMS TO "PRIVATE" REGULATION

PAUL SCHIFF BERMAN*

INTRODUCTION

The "old" days of legal and cultural theory about online interaction are already behind us. Commentators can no longer speak confidently about cyberspace as an inherently unregulatable space, where sovereign governmental entities will be impotent and where newly empowered individuals will force the collapse of all kinds of cultural intermediaries and brokers, from political parties, to media conglomerates, to corporations. Instead, a "second generation" of thinking about the Net has emerged,[1] less sanguine in its analysis of online regulation and more sober in its discussion of individual empowerment.

---

* Associate Professor, University of Connecticut School of Law. An earlier version of this article was presented at a Symposium on "Telecommunications Law for the 21st Century," held in February 2000 at the University of Colorado School of Law. I am grateful to symposium organizer Phil Weiser and to the University of Colorado Law Review for inviting me to participate. This draft incorporates many helpful comments from participants in that symposium, as well as useful insights offered by Laura A. Dickinson, Robert W. Gordon, John Owens, and my colleagues Anne Dailey, Richard Kay, and Jeremy Paul. I also acknowledge the valuable research assistance of Bryan A. Carey.

1. *See, e.g.*, LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999); James Boyle, *Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors*, 66 U. CIN. L. REV. 177 (1997); Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace*, 28 CONN. L. REV. 981 (1996); Julie E. Cohen, *Intellectual Privacy and Censorship of the Internet*, 8 SETON HALL CONST. L.J. 693 (1998); Lawrence Lessig, *Constitution and Code*, 27 CUMB. L. REV. 1 (1996–97); Lawrence Lessig, *The Limits in Open Code: Regulatory Standards and the Future of the Net*, 14 BERKELEY TECH. L.J. 759 (1999); Lawrence Lessig, *What Things Regulate Speech: CDA 2.0 vs. Filtering*, 38 JURIMETRICS J. 629 (1998); Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules Through Technology*, 76 TEX. L. REV. 553 (1998); Andrew L. Shapiro, *The Disappearance of Cyberspace and the Rise of Code*, 8 SETON HALL CONST. L.J. 703 (1998).

Perhaps the most significant observation made by such second-generation theorists concerns the ways in which behavior may be regulated online. Many of us tend to think of regulation solely as the coercive commands of a sovereign entity. When the legislature passes a law proscribing some behavior, or an administrative agency establishes rules, or a court issues an order, it is easy to see how such activity regulates behavior. In contrast, it is more difficult to recognize the powerful way in which our environment and the architecture of our space applies a regulatory force. If one wanted to prohibit automobiles from driving into a public park,[2] for example, one could pass a law forbidding such conduct and then hire police officers to patrol for violations. But one could also simply build walls that make it much more difficult (if not impossible) as a practical matter for the automobile to enter the park in the first place. It is important to realize that both the law and the wall function as regulatory tools.

In cyberspace, this second type of regulation is likely to be more powerful than the first because the "architecture" of cyberspace is determined by software code, which, by its very nature, is infinitely malleable and operates through the technology itself. Thus, in order to limit access to obscene or indecent speech, a sovereign government can try to pass a law banning such speech, but the government is likely to encounter enforcement problems. Such problems might include the difficulty of tracking down online perpetrators—particularly those who disguise their identities—and the possibility that an offender is from a different jurisdiction, rendering him beyond the regulatory reach of the enforcing government. Indeed, cyber-utopians initially proclaimed the online world an inherently unregulatable space precisely because of these types of problems.[3] A government is not limited to this style of regula-

---

2. This example derives from H. L. A. Hart's classic discussion of the hypothetical ordinance prohibiting vehicles in a park. *See* H.L.A. HART, THE CONCEPT OF LAW 126–30 (2d ed. 1994).

3. *See, e.g.*, David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996). *See also* John Perry Barlow, *A Declaration of the Independence of Cyberspace* (visited Jan. 28, 2000) <http://www.eff.org/~barlow/Declaration-Final.html>.

> Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. . . . I declare the global social space we are building to be naturally independent of the tyrannies

tion, however. Instead, it could create (or encourage the creation of) filters that will effectively "zone" cyberspace into areas that can be entered only by those possessing certain qualifications—a credit card, for example, or an adult identification number. This "code-based" regulation is potentially far more efficient—and therefore far more powerful—than a coercive command issued by a sovereign because the enforcement mechanism is embedded in the technological architecture itself. Thus, as James Boyle has observed, the "Austinian"[4] positivist model of the lumbering state, regulating through its unwieldy apparatus of power, is being replaced in cyberspace by a model of power more akin to that envisioned by Michel Foucault,[5] where coercion is so much a part of the landscape that we often fail even to recognize it.[6]

Significantly, not only sovereign governments, but also private entities can wield this code-based power. If an access screen requires a user to click "OK" to contractual terms, and those terms obligate the reader to pay a dollar per page viewed at a given web site, then the dollar fee becomes the "law" of that web site, even if the copyright law would have permitted the use for free.[7] Similarly, if America Online wishes to censor a user's speech from its chatrooms, it can simply eliminate the user's on-line privileges, regardless of whether the First

---

> you seek to impose on us. You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to fear. . . . Your legal concepts of property, expression, identity, movement, and context do not apply to us. They are based on matter, and there is no matter here.

Id.

4. *See generally* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (Isaiah Berlin et al. eds., 1954).

5. *See generally* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

6. *See generally* Boyle, *supra* note 1.

7. For further discussion of the relationship between copyright and contract law in the online context, *see generally* Tom W. Bell, *Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N.C. L. REV. 557 (1998); Niva Elkin-Koren, *Copyright Policy and the Limits of Freedom of Contract*, 12 BERKELEY TECH. L.J. 93 (1997); William O. Fisher III, *Property and Contract on the Internet*, 73 CHI.-KENT L. REV. 1203 (1998); Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised*, 14 BERKELEY TECH. L.J. 519 (1999).

Amendment would protect that speech.[8] And, perhaps most importantly, because the technical standard-setting bodies of cyberspace are non-governmental, they may face no real oversight at all.[9]

If private entities will play an increasingly large role in creating the code that regulates cyberspace, what role does the Constitution play in regulating those private entities? In his recent book, *Code and Other Laws of Cyberspace*, Lawrence Lessig argues that we must recognize code as a powerful regulatory force, and therefore subject code to the norms and values of our constitutional tradition. This is an attractive argument, and one to which I am sympathetic, but as a matter of legal doctrine, it comes up against at least one major difficulty: the state action doctrine.

Having its genesis in an 1883 Supreme Court decision overturning Reconstruction-era civil rights legislation,[10] the state action doctrine, in its least nuanced form, rests on the observation that most constitutional commandments proscribe only the conduct of governmental actors. For example, the Fourteenth Amendment provides that "No *state* shall. . . ."[11] As a result, the Supreme Court has often refused to apply these constitutional provisions to so-called "private action." Thus—and again to express the doctrine in its least subtle form—the state cannot constitutionally exclude African-Americans from a government housing facility, but the Constitution is silent with regard to an individual's choice to exclude African-Americans from his or her home. Similarly in cyberspace, so the doctrine might go, the activities of private corporations, such as America Online or the new domain name governing body ICANN,[12] or the various Internet technical standard-setting groups such as the World Wide Web Consortium or the Internet Engineering Task Force, are not subject to the Constitution because they are not state actors.

---

8. *See, e.g.*, Cyber Promotions, Inc. v. America Online, 948 F. Supp. 436 (E.D. Pa. 1996). For further discussion of this issue, see generally Amy Harmon, *Worries About Big Brother at America Online*, N.Y. TIMES, Jan. 31, 1999, at A2.

9. *See infra* notes 163–66 and accompanying text.

10. *See* The Civil Rights Cases, 109 U.S. 3 (1883).

11. *See* U.S. CONST. amend. XIV (emphasis added).

12. The acronym stands for Internet Corporation for Assigned Names and Numbers.

Of course, as commentators have pointed out, the state action doctrine rests on the often illusory hope that we can draw a clear and coherent line between what constitutes public as opposed to private behavior.[13] Indeed, Supreme Court decisions about state action have been uncertain and often inconsistent.[14] And scholars frequently have criticized the state action doctrine both as a matter of historical fidelity[15] and public policy.[16] Nevertheless, courts show no sign of discarding the doctrine. For example, when an online service provider recently attempted to take action against an entity that had sent junk e-mail on its service, a district court rejected the e-mailer's argument that such censorship of e-mail violated the First Amendment.[17] The court relied on the state action doctrine, reasoning that the service provider was not the state and

13. *See, e.g.*, HENRY J. FRIENDLY, THE DARTMOUTH COLLEGE CASE AND THE PUBLIC-PRIVATE PENUMBRA (1968); Kenneth M. Casebeer, *Toward a Critical Jurisprudence—A First Step by Way of the Public-Private Distinction in Constitutional Law*, 37 U. MIAMI L. REV. 379 (1983); Henry J. Friendly, *The Public-Private Penumbra—Fourteen Years Later*, 130 U. PA. L. REV. 1289 (1982); Robert L. Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 COLUM. L. REV. 149 (1935); Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982); Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J. L. REFORM 835 (1985).

14. *Compare, e.g.*, Shelley v. Kraemer, 334 U.S. 1 (1948), *with* Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978), *and* Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982).

15. *See, e.g.*, Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863 (1986); Alan R. Madry, *Private Accountability and the Fourteenth Amendment: State Action, Federalism, and Congress*, 59 MO. L. REV. 499 (1994); Steven L. Winter, *The Meaning of "Under Color of" Law*, 91 MICH. L. REV. 323 (1992).

16. For a sample of scholarly articles criticizing or condemning the state action doctrine, see Larry Alexander, *Cutting the Gordian Knot: State Action and Self-Help Repossession*, 2 HASTINGS CONST. L.Q. 893 (1975); Charles L. Black, *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1966); Paul Brest, *State Action and Liberal Theory: A Casenote on Flagg Brothers v. Brooks*, 130 U. PA. L. REV. 1296 (1982); Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503 (1985); Louis Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962); Harold Horowitz, *The Misleading Search for State Action Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208 (1957); Anthony Thompson, *Piercing the Veil of State Action: The Revisionist Theory and a Mythical Application to Self-Help Repossession*, 1977 WIS. L. REV. 1; William Van Alstyne & Kenneth Karst, *State Action*, 14 STAN. L. REV. 3 (1961).

17. *See* Cyber Promotions, Inc. v. America Online, 948 F. Supp. 436 (E.D. Pa. 1996).

therefore was not subject to the commands of the First Amendment.[18]

The state action doctrine, therefore, poses a significant challenge to those who see private regulatory power as a threat to individual rights and public discourse online. Not surprisingly, scholars focusing on cyberspace have revived some of the arguments that have been used against the state action doctrine for decades, beginning with the Legal Realists in the 1920s and 1930s.[19] The most common strategy is to denounce the very idea that there is or should be a public/private distinction. Scholars advancing this argument have pointed out that so-called private ordering always takes place against the backdrop of property and contract rights that are enforced by the state.[20] Therefore, they contend that any purported distinction between public and private is inevitably incoherent. Accordingly, we might call this the "incoherence critique." In the online context, a recent article explicitly resurrects this critique and refers to the very idea of private ordering as a "myth" that must be dispelled "[o]ne more time."[21]

Although the incoherence critique may be correct, its appeal seems limited. Indeed, not only have courts been unmoved, but my guess is that most Americans are likely to resist, on an intuitive level, scholarly attempts to erode the distinction between public and private. Most of us like to believe that there are spheres of privacy in which we exist, untouched by the state. The argument that such private spheres are illusory, and that our activities are inextricably bound up in the state, therefore, is unlikely to be persuasive. Consequently, a different sort of argument may be necessary. Instead of repeatedly trying to demonstrate that seemingly private activity is actually public, we could instead focus on the benefits we might derive as a people from using the Constitution to debate fundamental societal values, without relying so heavily on whether the activity is categorized as public or private.

---

18. *See id.* at 441–45.

19. *See, e.g.*, Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927); Hale, *supra* note 13.

20. *See infra* Part II.A.

21. *See* Margaret J. Radin & R. Polk Wagner, *The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace*, 73 CHI.-KENT L. REV. 1295, 1295 (1998).

I intend to undertake this second sort of inquiry. I will argue that constitutional adjudication can foster constructive societal debate about social and political issues. It can permit courts to perform an educative function by articulating values and constructing narratives that help constitute our national identity. Further, such adjudication can create opportunities for courts to operate as deliberative fora in which difficult political issues are addressed. For all of these reasons, we may decide that measuring a broader range of activities against constitutional norms carries significant cultural benefits. We might call this approach "constitutive constitutionalism."

Adopting such a perspective does not mean, of course, that the constitutional claim will always be successful; constitutional norms might well have different force in different contexts and when balanced against competing considerations. The important point is that, however such questions get resolved, at least we will have been forced to grapple with the substantive constitutional question and to articulate the competing values at stake. The state action doctrine, in contrast, takes such debates off the table altogether by asserting that the activity at issue is private and therefore not a fit subject for constitutional discourse. If one believes that such discourse, in and of itself, has cultural value, then application of the state action doctrine comes with a significant cost.

I do not intend, in this article, to offer a detailed framework for how courts should approach state action questions. Moreover, I recognize that there are important arguments that could be offered against permitting federal courts to adjudicate constitutional claims in a broader range of cases. Such counter-arguments implicate fundamental concerns about the role of courts in a democratic system and the proper allocation of power between the federal and state judiciary. Thus, I am not advocating that every legal dispute necessarily be turned into a constitutional battle. The goal of this article is far more limited. It is my contention that a true debate about the appropriate contours of the state action doctrine is impossible until we recognize that there is more at stake than simply the coherence of the public/private distinction or even the substantive check on private power that might result. We also must consider the societal benefits that arise from a broader conception of the Constitution. There can be little doubt that scholars and courts, in discussing the state action doctrine, have paid insuf-

ficient attention to these cultural benefits. Therefore, I argue only that we must take the benefits of constitutive constitutionalism into consideration before we can truly evaluate the appropriate contours of our conception of state action.

In addition, although a theory of constitutive constitutionalism potentially offers an even more sweeping argument for broadening the state action doctrine than the incoherence critique, it seems more likely to resonate within the popular consciousness. Most Americans are likely to resist the notion that the activities of America Online are "really" public and therefore subject to constitutional scrutiny. In contrast, it may be more persuasive to say that, whether America Online is public or private, there are certain values that we hold as a community, values that America Online may be threatening. Indeed, if it is true that we already think of the Constitution as embodying such constitutive values of our society, it may seem quite natural to use the Constitution as a touchstone for evaluating a broader range of social interaction. Moreover, an argument based on constitutive constitutionalism may also be particularly persuasive in the context of debating online regulation, because in cyberspace it is perhaps easier to see how private entities can threaten cherished constitutional norms.

My discussion proceeds in three parts. First, I will summarize Lessig's argument that, in cyberspace, code is equivalent to law, therefore making private regulation an especially powerful and potentially dangerous force. In particular, I will focus on his claim that private filtering of online content poses a greater threat to freedom of speech than a government-mandated zoning scheme akin to Congress's ill-fated Communications Decency Act. Second, I will briefly discuss some of the scholarship targeting the public/private distinction in general and a recent attempt to apply this Legal Realist critique to cyberspace specifically. I will also describe one court's rejection of this argument in the online context. Finally, I will offer my alternative vision of constitutional discourse as a forum for debating social and political issues and for constructing narratives about constitutive values. Consideration of this perspective may serve to inject some often-overlooked cultural considerations into the state action debate, both as it applies to online interaction and to private power generally.

This is a crucial time in the development of cyberspace because the regulatory framework we[22] choose now, and the assumptions that underlie such a framework, will inevitably influence the way we come to think of online interaction. And, of course, as online interaction increasingly pervades our daily activities, the regulation of cyberspace may well become simply the regulation of our lives and expectations more generally. If we view cyberspace as a libertarian utopia that must be free from state interference or constitutional scrutiny, we may ultimately find that the online world (and society at large) has become a place that runs roughshod over values of free speech, privacy, and public access we hold dear. Thus, it is essential that we take the time now to ask fundamental questions about how the Constitution operates in this arena. Indeed, by asking these questions, we will better understand what kind of people we are becoming in the information age that is already upon us.

I. CODE, AND THE PRIVATE REGULATION OF SPEECH IN CYBERSPACE

In his recent book, *Code and Other Laws of Cyberspace*, Lawrence Lessig argues that the technical architecture of cyberspace is a powerful regulatory force that must be recognized in our policy-making and even in our constitutional debates. Moreover, this technical architecture—or "code," to use his name for it—may be manipulated by private entities just as easily as by sovereign governments. Thus, his insights directly implicate the issue of whether such private behavior should be subject to constitutional scrutiny. Lessig himself, however, appears to have little patience for the state action doctrine or the public/private distinction on which it is based, and sloughs off the issue with only a few paragraphs of discussion. In this Part, I will outline Lessig's argument, focusing on the issue of free speech in cyberspace, and then discuss his response to potential objections grounded in the state action doctrine.

---

22. Although this article focuses on United States constitutional values and their relationship to the regulation of cyberspace, I recognize, of course, that the "we" who must be involved in decision making about online interaction is potentially global. Nevertheless, since a majority of the private entities creating the infrastructure of cyberspace are based in this country, our own constitutional values are probably a useful place to begin the discussion.

In his chapter on free speech, Lessig begins with the observation that any discussion of the subject cannot focus on government behavior alone. He points out that "[t]wo societies could have the same 'First Amendment'—the same protections against government's wrath—but if within one dissenters are tolerated while in the others they are shunned, the two societies would be very different free speech societies."[23] Instead, he argues that "[a] complete account of this—and any—right must consider the full range of burdens and protections."[24]

Lessig places these various "regulatory" forces into four categories: law, norms, market, and architecture.[25] All four of these "modalities" regulate behavior. For example, it is certainly true that, in most circumstances, the force of law embodied in the First Amendment protects my right to advocate the decriminalization of drugs. But that legal protection is not the only force operating on my behavior. A network of social norms exists in society as well, and I might find myself shunned by my neighbors for advocating an unpopular view. If I care about my social standing in the community, such shunning will strongly influence my decision about whether to express an unpopular viewpoint.

Similarly, the market constrains my ability to advocate my position. Television stations might refuse to carry advertisements advocating unpopular views for fear of losing revenue because incensed viewers might stop watching. Even if I were permitted to advertise, my financial resources and the cost of advertising would clearly regulate how well my speech could be disseminated within the society.

Finally, the architecture of our social space exerts a regulatory force. In the United States, we do not have speakers' corners in every city, most towns do not hold town meetings, and because our social spaces are governed by the logic of the detached suburban home, the automobile, and the interstate, we generally do not have unmediated fora for speaking and listening to a variety of viewpoints on matters of public concern.

Thus, as Lessig points out, "the protection for controversial speech is more conditional than a narrow legal view would sug-

23. LESSIG, *supra* note 1, at 164.
24. *Id.*
25. *See id.* at 165.

gest."[26] Accordingly, he argues that all four "modalities"—law, norms, market, and architecture—must be factored into any accurate account of the content of free speech in America.

Turning to cyberspace, Lessig focuses primarily on the regulatory force exerted by code—the technical architecture of online interaction—and he contrasts code-based regulation of speech online with the regulation of speech made possible through law. Specifically, Lessig describes Congress's attempt to regulate pornographic material in cyberspace, the Communications Decency Act of 1996.[27] This law made it a felony to transmit "indecent" material online to a minor or to a place where a minor could observe it, while giving content providers a defense if they took good-faith "reasonable, effective" steps to screen out children.[28]

As Lessig notes, the Communications Decency Act "practically impaled itself on the First Amendment,"[29] because it was both too broad and too vague. But the provocative question Lessig takes up is whether there are other ways one might go about regulating such online content and, if so, how we would choose among the possible alternatives. In particular, Lessig contrasts "zoning" solutions based in law, and "filtering" solutions based in code.

In a zoning solution, "[s]peakers are zoned into a space from which children are excluded."[30] This is the model adopted both by the Communications Decency Act and by Congress's more recent attempt to regulate online pornography, the Child Online Protection Act.[31] Under these statutes, sites offering the types of material Congress wants kept from minors must deny access unless users can verify that they are adults. An al-

---

26. *Id.* at 166.

27. 47 U.S.C. § 223(a)(1)(B)(ii) (Supp. III 1997) (criminalizing the "knowing" transmission of "obscene or indecent" messages to any recipient under 18 years of age); 47 U.S.C. §223(d) (prohibiting "knowingly" sending or displaying to a person under 18 of any message "that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs").

28. *See* 47 U.S.C. § 223(e)(5)(A) (Supp. III 1997).

29. LESSIG, *supra* note 1, at 174.

30. *Id.* at 175.

31. Pub. L. No. 105-277, 112 Stat. 2681 (1998) (to be codified at 47 U.S.C. § 231). The only court to address the constitutionality of the Child Online Protection Act issued a preliminary injunction preventing the Act from taking effect pending further litigation. *See* ACLU v. Reno, 31 F. Supp. 2d. 473, 477 (E.D. Pa. 1999).

ternative zoning regime might require that minors and their parents be given the ability to configure their web browsers so as to identify themselves as minors. As a result, such minors would then electronically announce their status as minors to any site visited. Under this scheme, web sites offering restricted material would simply block access to self-identified minors.[32]

Both of these zoning schemes derive from a government command. In contrast, plans to develop a world wide web content-filtering system are proceeding in the private sector, without any express statutory initiative. This filtering system, developed by an internet technical standard-setting body called the World Wide Web Consortium, is known as the Platform for Internet Content Selection ("PICS").[33] PICS is not, in and of itself, a rating system. Indeed, it is completely neutral among the various possible ratings systems that might result. As conceived, PICS is simply a technical "language with which content on the Net could be rated, and with which decisions about how to use that rated material could be made from machine to machine."[34] Under PICS, both content providers and private entities can rate web sites based on any rating system they wish. For example, the Anti-Defamation League could develop a set of ratings, as could the Christian Coalition, or the American Civil Liberties Union. At the same time, software manufacturers would compete to write software that could filter material based on the ratings.

So then the question becomes: how do we evaluate these two different architectures for regulating speech? Significantly, the zoning regimes use legal requirements to force speech behind certain technological walls; the filtering regime follows from individual choice. Any organization can rate content, and individuals can choose the rating system they wish to use. Thus, as Lessig points out, zoning looks like "censorship," whereas filtering looks like "choice," and we are apt to embrace filtering while denigrating censorship as unconstitutional.[35]

---

32. *See* LESSIG, *supra* note 1, at 176.

33. *See* World Wide Web Consortium, *Platform for Internet Content Selection (PICS)*, (visited Feb. 1, 2000) <http://www.w3.org/PICS>; *see also* Paul Resnick, *Filtering Information on the Internet*, SCI. AM., Mar. 1997, at 106.

34. LESSIG, *supra* note 1, at 178 (citing statements of PICS developers).

35. *See id.*

Lessig argues that, from a free speech perspective, this intuition is completely backward. First, he points out that filters can be imposed anywhere in the distribution chain. As a result, while we might assume that the PICS filter exists only on the computer owned by the end-user, nothing in the technology prevents an online service provider or a search engine from employing one or more filters. Moreover, these filters can be imposed without the end-user ever being aware of it. If I perform a search using a search engine that filters sites, my search results will not reveal those sites that are blocked, and I may never know that the filtered sites exist at all.

In contrast, under a zoning regime, those who are denied access to a site are instantly made aware that they cannot enter. Thus, the exclusion is immediately subject to challenge by the person being excluded. "Zoning . . . builds into itself a system for its own limitation. A site cannot block someone from the site without that individual knowing it."[36]

Second, Lessig argues that the filtering scheme relies on the development of a market in rating systems, thereby encouraging organizations to filter far more than the harmful-to-minors speech that may be regulated under our First Amendment jurisprudence. "[T]he market, whose tastes are the tastes of the community, facilitates the filtering."[37] Accordingly, "[t]he filtering system can expand as broadly as the users want, or as far upstream as sources want."[38]

The zoning scheme operates with the opposite set of incentives because content providers generally do not wish to block out potential users and would therefore want their sites to be viewed by as many people as possible. The only limitations would be those that may be constitutionally imposed. Further, because the definition of the proscribed sites would be generated by the government, those proscriptions could be tested by courts against the Constitution. As Lessig points out, "[t]he filtering regime would establish an architecture that could be used to filter any kind of speech, and the desires for filtering then could be expected to reach beyond a constitutional mini-

36. *Id.* at 179.
37. *Id.* at 178.
38. *Id.*

mum; the zoning regime would establish an architecture for blocking that would not have this more general purpose."[39]

For these reasons, Lessig sees the filtering system as more of a threat to the core value of free expression than a government-imposed zoning system.

> In my view, we should not opt for perfect filtering. We should not design for the most efficient system of censoring—or at least, we should not do this in a way that allows invisible upstream filtering. Nor should we opt for perfect filtering so long as the tendency worldwide is to overfilter speech. If there is speech the government has an interest in controlling, then let that control be obvious to the users. Only when regulation is transparent is a political response possible.[40]

Significantly, Lessig makes clear that he "would opt for a zoning regime even if it required a law and the filtering solution required only private choice."[41] It does not matter to Lessig whether the regulation of speech derives from law, norms, the market, or code. He looks only to the ultimate effect on speech: "the question is the result, not the means—does the regime produced . . . protect free speech values?"[42]

Thus, Lessig emerges with the somewhat surprising conclusion that a statute such as the Communications Decency Act (drafted more carefully, of course) would better protect the value of free speech than a PICS system that enables private filtering. He opts for the government "censorship" regime because of his understandable fear that, in cyberspace, the most significant threats to freedom[43]—whether they be free speech, privacy, or any other substantive liberty—may not come from governments wielding laws. "An extraordinary amount of control can be built into the environment [of cyberspace]. What data can be collected, what anonymity is possible, what access is granted, what speech will be heard—all these are . . . de-

---

39. *Id.* at 179.
40. *Id.* at 181.
41. *Id.*
42. *Id.*
43. Lessig's idea of freedom here, of course, is far broader than the traditional liberal conception, which focuses primarily on freedom of individuals only as against the government.

signed, not found."[44] And, though the architecture of cyberspace may embed core political and even constitutional values, the architectures are, for the most part, private. "They are constructed by universities or corporations and implemented on wires no longer funded by the Defense Department."[45] As the filtering example demonstrates, private entities using the power of code may wield tremendous regulatory authority, but because they are private, they are free from constitutional scrutiny.[46]

But *should* such private power be free from constitutional scrutiny? Lessig obviously thinks it should not, but instead of mounting a sustained attack on the state action doctrine, he barely engages the question at all. His only real argument is that the malleability of code in cyberspace is unlike anything the framers could have intended, leaving us free to decide for ourselves how to apply the Constitution with regard to private activity.[47] This approach seems unsatisfactory. After all, even if it is true that we are now free to "decide on our own what [approach] makes better sense of our constitutional tradition,"[48] we are still left with little guidance in actually making choices about how to evaluate private regulatory power.

Thus, while Lessig forcefully argues that the technical architectures of cyberspace should be subject to constitutional scrutiny, he does not squarely address those who would point to the state action doctrine as an important and even a necessary part of our constitutional tradition. Indeed, at one point, he even acknowledges that "[o]thers are obsessed with [the] distinction between law and private action. They view regulation by the state as universally suspect and regulation by pri-

---

44. *Id.* at 217.

45. *Id.*

46. The zoning versus filtering question is only one of many examples Lessig provides in his book. Moreover, his general concerns about private power in cyberspace are reflected in much of the leading legal scholarship about online interaction. *See, e.g., id.* It could be argued, of course, that such concerns are overstated, or that the consequences of private power in the online environment can be addressed adequately in the legislative arena. This article neither discusses nor takes sides on that particular debate. Instead, I take as given that there are serious concerns, both within the scholarly community and among the public at large, about the extent of private power in cyberspace, and I suggest one possible response to such concerns.

47. *See id.*

48. *Id.*

vate actors as beyond the scope of constitutional review."[49] And, he goes so far as to admit that "most constitutional law" is on the side of those who espouse this view.[50] He insists, however, that we "should not get caught up in the lines that lawyers draw," focusing instead on "the values we want cyberspace to protect," and leaving the lawyers to "figure out how."[51]

Such a statement may be satisfactory in a book aimed at a popular audience, which Lessig's is. But those of us in the legal academy who might be persuaded by Lessig's warning about private encroachment on fundamental liberties must take the next step and develop arguments for why the Constitution should be interpreted to protect such liberties in the private arena. Accordingly, in the next Part, I review the critique that using a distinction between public and private in constitutional adjudication is fundamentally incoherent. Then, in the final Part, I will consider a possible alternative approach, based on the cultural power of using the Constitution to articulate and debate constitutive societal values.

II. STATE ACTION AND THE "INCOHERENCE CRITIQUE"

Academic opinion overwhelmingly has rejected the idea that legal doctrine should rest on a distinction between public and private action. Such criticism dates at least as far back as 1927, with the publication of Morris Cohen's classic Legal Realist article, *Property and Sovereignty*.[52] Yet, despite repeated attacks on the public/private distinction, it survives both as a matter of constitutional doctrine and popular intuition. This Part briefly describes what I call the "incoherence critique" of the state action doctrine as well as a recent article applying that critique to cyberspace. Then, I will discuss one lower court decision that nevertheless unhesitatingly applied the state action doctrine to bar a constitutional claim against an online service provider, indicating that both the state action doctrine and its public/private distinction are likely to survive despite academic criticism. Finally, I speculate about why a doctrine

49. *Id.* at 181.
50. *See id.*
51. *Id.*
52. *See* Cohen, *supra* note 19.

that has been repeatedly subjected to withering scholarly attack continues to show such resilience.

A. Critique of the Public/Private Distinction

Those who criticize the distinction between public and private in constitutional adjudication argue that the state action doctrine is incoherent because the state *always* plays a major role, implicitly or explicitly, in any legal relationship.[53] First, they observe that all private actions take place against a background of laws. These laws embody state decisions either to permit or proscribe behavior. For example, legally permitted actions are permitted solely because the state has made a decision not to prohibit those actions. If such actions ultimately cause harm, it is therefore difficult to say the state has played no role.

Second, individual choices are strongly influenced by the context of state-created law. For example, a governmental zoning scheme may well be the motivating force behind an ostensibly private decision about private property. Similarly, scholars have demonstrated that the seemingly private behavior within a family is in fact heavily influenced by laws governing marriage, divorce, custody, property, and education. As Frances Olsen has observed,

> Both laissez faire and nonintervention in the family are false ideals. As long as a state exists and enforces any laws at all, it makes political choices. The state cannot be neutral or remain uninvolved, nor would anyone want the state to do so. The staunchest supporters of laissez faire always insisted that the state protect their property interests and that courts enforce contracts and adjudicate torts. They took this state action for granted and chose not to consider such protection a form of state intervention. Yet the so-called "free market" does not function except for such laws; the free market could not exist independently of the state. The enforcement of property, tort, and contract law requires constant political choices that may benefit one economic actor, usually at the expense of another. As Robert Hale

53. My discussion in this section owes much to Richard Kay's excellent summary of scholarship targeting the public/private distinction. *See* Richard S. Kay, *The State Action Doctrine, the Public–Private Distinction, and the Independence of Constitutional Law*, 10 CONST. COMMENT. 329, 334–37 (1993).

> pointed out more than a half century ago, these legal decisions "are bound to affect the distribution of income and the direction of economic activities." Any choice the courts make will affect the market, and there is seldom any meaningful way to label one choice intervention and the other laissez faire. When the state enforces any of these laws it must make political decisions that affect society.[54]

Third, the state plays a role in defining what even counts as a legally cognizable injury. Our property regime would permit me as a property owner to exclude a trespasser who wishes to put wallpaper over my windows, thus obstructing my view of a beautiful vista. Yet that same property regime likely would not permit me to prevent my neighbor from adding three floors to her house, causing the very same obstruction to the very same view. Thus, "[t]here is no clear distinction between a state invasion of property interests and its inevitable role in defining those interests."[55]

Fourth, even the definition of what constitutes a legally-cognizable person is dependent on law. For example, the state has chosen to treat a corporation like a person. The state has also implicitly conferred standing on human beings, but not on trees.[56] And, of course, as anyone with knowledge of the history of slavery in this country knows, the legal definition of a human being is subject to change over time based on state decisions.[57]

Finally, scholars have pointed out that the idea of a public sphere is itself a cultural construction, and that what an individual views as "public" will be a projection of his or her own values and assumptions.[58] Accordingly, the public sphere will inevitably tend to reflect the perspective of more dominant groups within society.[59] Or, one can flip the argument around, and similarly view the idea of a "private" sphere as a cultural

---

54. Olsen, *supra* note 13, at 837.

55. Kay, *supra* note 53, at 335; *see also* Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. CAL. L. REV. 1393 (1991).

56. *See* Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 456 (1972).

57. *See, e.g.*, Dred Scot v. Sanford, 60 U.S. 393 (1857).

58. *See, e.g.*, JUDITH N. SHKLAR, THE FACES OF INJUSTICE 7 (1990) ("In truth, the line separating the private from the public sphere is . . . a political choice depending on ideology and deep cultural habits of mind.").

59. *See, e.g.*, Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987).

construction. Because one's private choices are always made through values, language, and beliefs inherited from and influenced by the culture at large, the state will always play a constitutive role in the shaping of such choices.[60]

Thus, the "conceptual categories in which we define what is an injury, who has caused it, and who has suffered from it are public artifacts."[61] Moreover, the distinction between public and private itself rests on cultural constructions that tend to reflect dominant players in society. Accordingly, the very determination of what is public and what is private is inevitably public.[62]

B. Private v. Public in Cyberspace

Arguments about the distinction between public versus private ordering have resurfaced in discussions about cyberspace regulation. Self-proclaimed cyber-libertarians have argued both that cyberspace is inherently unregulatable by territorially-based sovereigns and that, as a normative matter, such a failure is to be celebrated because it will usher in the promise of "bottom-up" regulation created by non-state actors.[63] In this laissez-faire vision, private entities will be free to create their own law—the "law" of E-bay, for example, or the Terms of Service created by America Online. Such private law will create, in effect, a free market in law. People will vote with their browsers by flocking to those sites or providers whose law they find acceptable.[64]

---

60. *See, e.g.*, NICOLA LACEY, STATE PUNISHMENT: POLITICAL PRINCIPLES AND COMMUNITY VALUES 144–45 (1988); CHARLES TAYLOR, PHILOSOPHY AND THE HUMAN SCIENCES 187–210 (1985); ROBERTO UNGER, KNOWLEDGE AND POLITICS 29–144 (1975); Stanley Fish, *Almost Pragmatism: Richard Posner's Jurisprudence*, 57 U. CHI. L. REV. 1447 (1990); Pierre Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627 (1991); Winter, *supra* note 15, at 387.

61. Kay, *supra* note 53, at 337.

62. *See id.*

63. *See* David G. Post, *Of Black Holes and Decentralized Law-Making in Cyberspace*, VAND. J. ENT. L. & PRAC. (forthcoming), *also available at* <http://www.temple.edu/lawschool/dpost/blackhole.html>.

64. *See* David G. Post, *The "Unsettled Paradox": The Internet, the State, and the Consent of the Governed*, 5 IND. J. GLOBAL LEGAL STUD. 521, 539 (1998). Post describes an "electronic federalism" whereby

> individual network access providers, rather than territorially-based states, become the essential units of governance; users in effect delegate the task of rule-making to them, thus conferring a portion of their sover-

In response to this perspective, one recent article, *The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace*, by Margaret Jane Radin and R. Polk Wagner, has explicitly revived the incoherence critique discussed in the previous section. As its title indicates, the article invokes the Legal Realists and their argument that all legal relationships are "public." According to Radin and Wagner, the Legal Realists demonstrated that, "[c]ontrary to laissez-faire ideology, the 'private' legal regimes of property and contract presuppose a 'public' regime of enforcement and policing, a baseline of background rights."[65]

Radin and Wagner criticize what they view as a resurgence of Friederich Hayek's stylized distinction between bottom-up and top-down ordering. Hayek believed that coercive rules laid down by sovereign governments were to be avoided, while a laissez-faire network of contracts and customary norms was to be encouraged.[66] Similarly, cyberlibertarians argue for bottom-up norm—and contract—creation while criticizing any state intervention.

But, as Radin and Wagner explain, such a distinction is incoherent because, to the extent the "private" ordering in cyberspace depends on rules of property and contract, it is relying upon norms created and enforced by the state.[67] Moreover, categorizing any particular regime as truly top-down or bottom-up, public or private, is difficult and perhaps impossible. "To some, nuisance law is unwanted top-down regulation; to others it is a needed limitation on property titles arrived at by bottom-up coordination among neighbors."[68] Indeed, even legislation passed by Congress can be viewed as bottom-up if it is

---

eignty on them, and choose among them according to their own individual views of the constituent elements of an ordered society. The 'law of the Internet' thus emerges, not from the decision of some higher authority, but as the aggregate of the choices made by individual system operators about what rules to impose, and by individual users about which online communities to join.

Id.

65. Radin & Wagner, *supra* note 21, at 1295.

66. *See generally* FRIEDERICH A. HAYEK, LAW, LEGISLATION AND LIBERTY (1973).

67. *See* Radin & Wagner, *supra* note 21, at 1297.

68. *Id.* at 1298.

thought of as the result of the grassroots efforts of various interest groups.[69]

Nevertheless, despite the continued scholarly critiques, there is no indication that courts will be any more likely to erode the public/private distinction in cyberspace than they have been in "real" space. Although cyberspace case law is very much in its formative stages, at least one lower court decision has explicitly refused to treat an online service provider as an entity subject to the First Amendment.

The case, *Cyber Promotions, Inc. v. America Online*,[70] concerned America Online's ("AOL's") attempts to stop Cyber Promotions ("Cyber") from sending unsolicited e-mail advertisements, often referred to as "spam," to AOL subscribers. After both parties filed complaints against each other, the district court asked them to brief the key constitutional question at issue: "Whether Cyber has a right under the First Amendment of the United States Constitution to send unsolicited e-mail to AOL members via the Internet . . . ."[71]

To answer this question, the court relied almost exclusively on the state action doctrine, finding that AOL was a private entity, not subject to the First Amendment, and was therefore free to block Cyber's e-mails as it pleased. The court rejected Cyber's contention that AOL's activities had the character of state action. For example, Cyber had argued that

> by providing Internet e-mail and acting as the sole conduit to its members' Internet e-mail boxes, AOL has opened up that part of its network and as such, has sufficiently devoted this domain for public use. This dedication of AOL's Internet e-mail accessway performs a public function in that it is open to the public, free of charge for any user, where public discourse, conversations and commercial transactions can and do take place.[72]

Cyber also argued that AOL's Internet e-mail connection constituted "an exclusive public function" because there were no alternative avenues of communication for Cyber to send its

---

69. *See id.*
70. 948 F. Supp. 436 (E.D. Pa. 1996).
71. *Id.* at 438.
72. *Id.* at 442–43.

e-mail to AOL members.[73] The court disagreed. The court first concluded that, although AOL had opened its e-mail system to the public by connecting with the Internet, it was not performing an "essential public service" and therefore was not standing in the shoes of the State.[74] Second, the court decided that Cyber had "numerous alternative avenues of sending its advertising to AOL members," including "United States mail, telemarketing, television, cable, newspapers, magazines and even passing out leaflets."[75]

It is beyond the scope of this article to engage in a debate as to whether these conclusions were justified, or whether the court's application of the state action doctrine to the facts of the case was correct. What is important for our purposes is: first, the assumption that the state action doctrine should govern this case; second, the conclusion that a nominally private online service provider would not be deemed a public actor regardless of its role in controlling public access to information online; and third, the fact that, because the court resolved the case using the state action doctrine, it avoided having to discuss the substantive First Amendment issues raised by the case. The *Cyber Promotions* decision makes clear that decades of criticism of the state action doctrine have had negligible effect both on the continued vitality of the doctrine and on its expansion into new areas of human social interaction, such as cyberspace.

C. *Four Theories Explaining the Continued Vitality of the State Action Doctrine*

For those scholars most committed to the idea that the public/private distinction is fundamentally incoherent, it is undoubtedly something of a mystery that the state action doctrine continues to survive in our constitutional jurisprudence. Indeed, during the 1960s alone, two scholars, Jerre S. Williams and John Silard, wrote articles predicting *The Twilight of State Action*[76] and the *Demise of the "State Action" Limit*,[77] while

---

73. *See id.* at 442.
74. *See id.*
75. *Id.* at 443.
76. Jerre S. Williams, *The Twilight of State Action*, 41 TEX. L. REV. 347 (1963).
77. John Silard, *A Constitutional Forecast: Demise of the "State Action"*

Charles Black began an article criticizing the doctrine with the almost plaintive question, "State action again?"[78] Nevertheless, despite a flurry of denunciation, which was followed in more recent decades by Critical Legal Studies scholarship embracing and expanding upon the incoherence critique,[79] the state action doctrine shows no sign of losing its force.

Why should this be so? Why should a doctrine variously accused of being incoherent, inappropriate, and irrelevant[80] live on? Particularly if one is persuaded, as I am, that a coherent distinction between public and private action cannot logically be maintained for the reasons described in the previous section, this question is difficult to answer. Nevertheless, four possibilities spring to mind. Examining these possibilities may help us to craft a different, and perhaps more intuitively appealing, understanding of the state action doctrine.

First, one could attribute the survival of the state action doctrine to historical happenstance. Much of the ferment over the state action doctrine until the mid-1960s can be traced to issues surrounding racial segregation and discrimination. Indeed, a vast majority of the Supreme Court's state action jurisprudence until that point concerned race.[81] These issues were largely removed from the constitutional map with the passage of the Civil Rights Act of 1964, which explicitly outlawed private discrimination. Further, with the later passage of statutes outlawing private gender discrimination[82] and discrimination against those with disabilities,[83] many of the cases formerly brought under the Constitution are now litigated as statutory questions. Thus, there can be no doubt that the pressure that was mounting with regard to the state action doctrine

---

Limit on the Equal Protection Guarantee, 66 COLUM. L. REV. 855 (1966).

78. *See* Black, *supra* note 16, at 69.

79. *See, e.g.*, Casebeer, *supra* note 13; Kennedy, *supra* note 13; Olsen, *supra* note 13; Winter, *supra* note 15.

80. *See* Dilan A. Esper, Note, *Some Thoughts on the Puzzle of State Action*, 68 S. CAL. L. REV. 663, 663–64 & nn.2–4 (1995) (citing scholarly criticism).

81. *See, e.g.*, Bell v. Maryland, 378 U.S. 226 (1964); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961); Pennsylvania v. City Trusts, 353 U.S. 230 (1957); Barrows v. Jackson, 346 U.S. 249 (1953); Terry v. Adams, 345 U.S. 461 (1953); Shelley v. Kraemer, 334 U.S. 1 (1948); Smith v. Allwright, 321 U.S. 649 (1944); Grovey v. Townsend, 295 U.S. 45 (1935); Nixon v. Condon, 286 U.S. 73 (1932); Corrigan v. Buckley, 271 U.S. 323 (1926); Buchanan v. Warley, 245 U.S. 60 (1917); The Civil Rights Cases, 109 U.S. 3 (1883).

82. *See* 42 U.S.C. § 2000e-2(e) (1994).

83. *See* 42 U.S.C. §§ 12101–12213 (1994).

in the 1950s and 1960s has dissipated since then. As a result, one might think that the state action doctrine has survived simply because it is no longer on the national agenda, allowing its incoherence to be overlooked.

While this view no doubt accounts for the lessening of scholarly attention since the 1960s, it seems insufficient to explain the continued power of the state action doctrine, particularly given the interest generated by celebrated cases such as *DeShaney v. Winnebago County Department of Social Services*,[84] and the critiques of the public/private distinction developed in the 1980s and 1990s by the Critical Legal Studies movement. However, to the extent that the only reason the state action doctrine has survived is its lack of importance, we might expect to see more attention paid to the doctrine now that the extent of private power online is becoming clearer.

A second perspective might focus on the changing political orientation of the federal judiciary. Since the highwater mark of the Warren Court era, so this explanation would go, the federal judiciary in general, and the U.S. Supreme Court in particular, have grown more hostile to rights-based claims. Therefore, those who believe questions of legal doctrine are inherently dependent on choices about political outcome would argue that conservative judges wishing to limit constitutional rights litigation have fixed on the state action doctrine as a mechanism for keeping such claims out of court without even considering their merits.

I find this explanation also less than fully persuasive. As an initial matter, even the Warren Court never embraced a theory of state action that would collapse the distinction between public and private behavior altogether.[85] In addition, a purely instrumental account of legal doctrine neglects the perceptions of judges themselves,[86] who tend to view their decision

84. 489 U.S. 189 (1989).

85. For example, even *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308 (1968), which applied First Amendment norms to a private shopping center, never went so far as to eradicate the distinction between public and private altogether. To the contrary, the Court explicitly acknowledged "that respondents' ownership of the property here in question [might give] them various rights, under the laws of Pennsylvania, to limit the use of that property by members of the public in a manner that would not be permissible were the property owned by a municipality." *Id.* at 319.

86. As Chief Judge Harry T. Edwards wrote recently: "[J]udges' views on how they decide cases should be relevant to understanding how judges in fact de-

making as largely constrained by an interlocking framework of philosophical principles, legal precedent, and the evolving traditions of the nation.[87] A theory of judicial decision making that relies on the assumption that the decision makers being described are either deluded or dissembling seems unlikely to provide a fully satisfying explanation of behavior.[88] Finally, the instrumental account ignores the fact that the *rhetoric* of judicial decision making, and not just the outcome, is a significant element in the dialogue between law and culture. Thus, if the idea of differentiating public and private action were sufficiently repugnant to the culture at large, it is likely that the judicial doctrine would ultimately be forced to change, regardless of the ideological persuasion of the judiciary.[89]

A third explanation for the continued vitality of the state action doctrine is that, even if the public/private distinction is incoherent, the doctrine nevertheless embodies other values and intuitions about constitutional adjudication. This theory has been advanced most powerfully by Richard Kay, who argues that the state action doctrine facilitates an essential divi-

---

cide cases." Harry T. Edwards, *Collegiality and Decisionmaking on the D.C. Circuit*, 84 VA. L. REV. 1335, 1364 (1998); *see also id.* at 1338 ("[S]erious scholars seeking to analyze the work of the courts cannot simply ignore the internal experiences of judges as irrelevant or disingenuously expressed. The qualitative impressions of those engaged in judging must be thoughtfully considered as part of the equation.").

87. *See, e.g.*, Benjamin Cardozo, *The Method of Sociology: The Judge as Legislator*, *in* THE NATURE OF THE JUDICIAL PROCESS 98–141 (1921); *see also, e.g.*, Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 WIS. L. REV. 837 ("[M]embers of the federal judiciary strive, most often successfully, to decide cases in accord with the law rather than with their own ideological or partisan preferences.").

88. More fundamentally, such an approach requires us to view debates about legal doctrine in their worst possible light, as smokescreens to disguise the fact that judgments are inevitably made based on factors that are supposed to be extraneous to judicial decision making. I reject this perspective because I believe it is more useful to resist the notion that our legal system is hopelessly compromised and instead try to understand our cultural practices as positive efforts to effectuate ideals, imperfect and halting though those efforts may be. As Richard Rorty has written, "Those who hope to persuade a nation to exert itself need to remind their country of what it can take pride in as well as what it should be ashamed of." RICHARD RORTY, ACHIEVING OUR COUNTRY 3 (1997); *see also* Paul Schiff Berman, *An Alternative to Suspicion: Notes Towards a Less Skeptical Approach to Legal/Cultural Scholarship*, (forthcoming) (manuscript on file with author).

89. *Cf.* GRANT GILMORE, THE DEATH OF CONTRACT (Ronald K.L. Collins ed., 1995) (discussing the cultural and legal shift from formalist ideas of contract to more tort-like theories such as promissory estoppel).

sion between constitutional law and "ordinary" law. According to Kay, the Constitution has various attributes that "mark it off from other kinds of law."[90] Kay contends that these attributes—including the Constitution's focus on the scope and shape of lawmaking power, its cumbersome amendment process, and its appeal to relatively permanent principles—make constitutional law unsuitable for ordinary law, which "tends to be more concerned with the resolution of day to day problems of social living."[91] In Kay's view, the state action doctrine is necessary to maintain this distinction, lest we "create more occasions for measuring the relative strengths of constitutional claims in . . . particular circumstances. Given the breadth of such claims, such a development would produce an even more widespread employment of *ad hoc* balancing."[92]

Kay presents a compelling case for understanding and justifying the longevity of the state action doctrine. Nevertheless, as I will argue in Part III, Kay's premise that constitutional law *should* be divorced from "ordinary" law might be complicated by a consideration of the cultural value of constitutional adjudication. In addition, I suspect that this more limited vision of the Constitution's scope would not accord with most people's intuitive understanding of the nature of constitutional rights. Thus, Kay's explanation is subject to challenge both on normative and descriptive grounds, and I will take up these points in more detail below.

Finally, perhaps the most obvious reason that scholarly attack has failed to dislodge the public/private distinction is that the distinction, however illogical, actually captures a fundamental societal intuition. Call it laissez-faireism if you wish, but it seems to me that most of us think of our private choices as being very different from the choices made by the state. As a result, I doubt that the arguments against the public/private distinction are likely to be successful, even if people find them analytically persuasive. This may seem paradoxical, but there is an important difference between arguments that are analytically persuasive and arguments that actually capture how we experience the world on a day-to-day basis. For example, I may, on some level, agree with the postmodern idea that there

90. Kay, *supra* note 53, at 338.
91. *Id.* at 338–39.
92. *Id.* at 339.

is no such thing as an autonomously created work of authorship, only a text capable of multiple readings.[93] Nevertheless, I may still experience my act of writing this article as a product of a subjective "I." An analytically compelling theory, therefore, may be resisted as an intuitive matter. Because successful legal arguments generally require *both* theoretical appeal and a fit with lived experience,[94] it is perhaps not surprising that the public/private distinction survives.

Thus, instead of continuing to focus on the supposed incoherence of trying to distinguish public from private behavior, those concerned with the unchecked exercise of private power might wish to consider an alternative approach. It is to such an approach that I now turn.

III. AN ALTERNATIVE APPROACH TO STATE ACTION: THE CONSTITUTION AS A CULTURAL TOUCHSTONE FOR ARTICULATING AND DEBATING CONSTITUTIVE VALUES

Given that decades of scholarship attacking the public/private distinction have failed to dislodge the state action doctrine, perhaps those who fear private power in cyberspace (and elsewhere) should seek a different kind of critique. My suggestion is that, instead of trying to argue that what we experience as private is actually public, perhaps we should focus on the Constitution's constitutive role in our cultural life, regardless of whether that life is lived in the public or private sphere.

I have previously mentioned Richard Kay's argument that the state action doctrine helps to insure the distinction between constitutional law and "ordinary" law. This distinction implicates fundamental questions about what a Constitution is and what it is for, as well as the role legal discourse plays in the culture at large. Thus, we must ask: whom does the Constitu-

---

93. *See, e.g.*, Roland Barthes, *The Death of the Author*, *in* IMAGE, MUSIC, TEXT 142 (Stephen Heath trans., 1977).

94. This idea is related to Ronald Dworkin's concept of interpretation. In Dworkin's view, judges and legal philosophers must "provide the best constructive interpretation of the community's legal practice" when reaching conclusions. RONALD DWORKIN, LAW'S EMPIRE 225 (1986). If Dworkin is right, then good legal decisions (or theories) must both "fit" and "justify" the community's deepest understanding of reality. *See id.* at 228–38 (likening the legal decision-making process to a chain novel in which the person creating the legal rule must construct the best understanding of all chapters prior to the one being written).

tion command? How far does the Constitution reach within our legal system and our society? Where does constitutional law leave off and "ordinary" law begin? And, most importantly for our purposes, how might a fuller understanding of law's cultural and symbolic roles in our society complicate Kay's assumption that we should *want* to draw a clear distinction between constitutional and ordinary law? To address these questions, I wish to focus on what I call "constitutive constitutionalism": the idea that the Constitution might appropriately be viewed as a touchstone for articulating constitutive values and for structuring public debate about fundamental social and political issues.

I begin this discussion by thinking about the potentially transformative role legal discourse in general might play within our society, especially given law's centrality to American culture. Only by understanding how important "law talk" is to our national mythology can we attempt to understand the potential power of constitutional discourse as a form of collective storytelling that helps form our self-identity as a people.

After this more general discussion, I consider specific cultural benefits we might derive from engaging in constitutional discourse about a broader range of social interaction. The state action debate ultimately boils down to the question of whether or not the Constitution will be the touchstone for considering whatever legal claim is at issue. If there is state action, then the Constitution is the frame for analysis; if not, "ordinary" law applies. From the perspective of constitutive constitutionalism, there are at least three reasons why we should prefer a broader scope for constitutional adjudication. First, the symbolic power of the Constitution permits courts adjudicating constitutional claims to play a rhetorical role in articulating national values. Second, courts applying constitutional norms may sometimes be a superior forum for addressing divisive political issues. And third, constitutionalizing a debate may encourage a more fruitful discourse in the society at large, because the relatively abstract values enshrined in the Constitution encourage participants to stake out moral philosophical claims. Finally, I suggest that one advantage of this vision of constitutive constitutionalism is that most Americans may find it to be more intuitively appealing than the incoherence critique.

A. The Cultural Impact of Legal Discourse

I start from the premise that law and legal procedures are at the core of American self-identity and are woven deeply into the fabric of our culture. This is not a new insight. Indeed, de Tocqueville's famous observation that "[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question"[95] has been repeated so often that it has itself become a part of our national lore. Throughout the past century, we can see that de Tocqueville's observation remains accurate. From the Scopes monkey trial to the battles over pornography on the internet, from the national debate about abortion to the more recent clashes over doctor-assisted suicide, from the success of novelist John Grisham to the explosion of law shows on television, we can easily see that our national obsession with law continues unabated. And, even though lawyers are often objects of derision, when the chips are down, we Americans are apt to frame our struggles in the language of competing rights and to fight our battles in a legal forum. Perhaps Thomas Paine sealed our legalistic fate over 200 years ago when he decreed that, in America, law would be King.[96]

Moreover, in this country, law functions as far more than a way of simply adjudicating disputes. It is also a forum for debating core societal values. In my opinion, this is not necessarily something to discourage. On the contrary, law can be a useful forum for societal debate because it is inherently multivocal. Law is a social practice that both recognizes the existence of many different narratives, and also provides the opportunity to create new narratives that may help forge group identity.[97] Legal proceedings, therefore, function in part as a site for adjudicating among various different explanatory narratives for describing reality.[98]

---

95. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 280 (Henry Reeve trans., Phillips Bradley ed., Vintage Classics 1990) (1835).

96. *See* THOMAS PAINE, COMMON SENSE, *in* THE COMPLETE WRITINGS OF THOMAS PAINE 29 (Philip S. Foner ed., 1969).

97. *See* Reva B. Siegel, *Collective Memory and the Nineteenth Amendment: Reasoning About "the Woman Question" in the Discourse of Sex Discrimination*, *in* HISTORY, MEMORY, AND THE LAW 131, 133–34 (Austin Sarat & Thomas R. Kearns eds. 1999).

98. *See generally* Paul Schiff Berman, *An Observation and a Strange but True "Tale": What Might the Historical Trials of Animals Tell Us About the Trans-*

Both trials and judicial opinions, for example, ultimately construct a narrative about a disputed event by rendering a decision or verdict. They do so, however, only after first enacting a performance in which the society "creates, tests, changes, and judges" the various competing discourses that could make up our social knowledge.[99] As James Boyd White has observed, law's strength is precisely in its ability to provide a forum for testing the persuasive power of competing narratives:

> The multiplicity of readings that the law permits is not its weakness, but its strength, for it is this that makes room for different voices, and gives a purchase by which culture may be modified in response to the demands of circumstance. It is a method at once for the recognition of others, for the acknowledgment of ignorance, and for cultural change.[100]

Law provides a set of institutions that emphasize the fact that "we are a discoursing community, committed to talking with each other about our differences of perception, feeling, and value, our differences of language and experience."[101]

In his seminal essay, *Nomos and Narrative*, Robert Cover argued that law functions in part as "a system of tension or a bridge linking a concept of a reality to an imagined alternative."[102] On this view, law is a language that allows us to discuss, imagine, and ultimately even perhaps generate alternative worlds spun from present reality. Cover therefore envisioned law as that which connects "reality" to "alternity."[103]

From this perspective, law has enormous potential as a creative and transformative discourse in our society. And this potential is relevant to the state action debate because, rather than thinking about whether behavior is properly characterized as public or private, we might instead consider how best to

---

formative Potential of Law in American Culture? (forthcoming) (manuscript on file with author).

99. Robert Hariman, *Performing the Laws: Popular Trials and Social Knowledge, in* POPULAR TRIALS: RHETORIC, MASS MEDIA, AND THE LAW 17, 29 (Robert Hariman ed., 1990).

100. James B. White, *Law as Language: Reading Law and Reading Literature*, 60 TEX. L. REV. 415, 444 (1982).

101. JAMES B. WHITE, JUSTICE AS TRANSLATION 80 (1990).

102. Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 9 (1983).

103. *See* Robert M. Cover, *The Folktales of Justice: Tales of Jurisdiction, in* NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER 173, 176 (Martha Minow et al. eds., 1995).

use law to harness its power as a cultural story-teller. In other words, if law is a forum for political and social discourse, how can we make that forum as fruitful as possible? The next section explores possible reasons to prefer constitutional discourse over "ordinary" law talk.

B. Cultural Benefits of Broader Constitutional Discourse

1. The Symbolic Power of the Constitution and the Role of Courts as Shapers of Social Memory

The Constitution undoubtedly has important symbolic power within our society. As Sanford Levinson has pointed out, our Constitution can be analogized to a sacred text that is invoked in order to emphasize national unity and integration.[104] The Constitution, particularly its rights-bearing provisions, symbolizes enshrined societal values and commitments. "Individuals see this national symbol (the Constitution) as promising effective legal entitlements and protections, and they often receive reassurance from lawyers that the Constitution—and the legal system—stand ready to deliver those protections."[105]

Because of this symbolic power, court decisions interpreting constitutional values may help to articulate (and shape) societal discourse on divisive issues. Indeed, as Reva Siegel has argued, the Constitution can serve as a vehicle for social memory. The Constitution allows us to tell stories about a common past. Such stories permit people to constitute themselves as a collective, with certain experiences, expectations, entitlements, obligations, and commitments in common.[106] These stories "also supply structures of ordinary understanding, frameworks within which ordinary members of a society interpret experience and make positive and normative judgments concerning it."[107] Thus, the Constitution can be seen as a way in which we create what scholars refer to as "collective memory."[108]

---

104. *See* SANFORD LEVINSON, CONSTITUTIONAL FAITH 17 (1988).

105. Christopher E. Smith, *Law and Symbolism*, 1997 DET. C. L. REV. 935, 938 (1997).

106. *See* Siegel, *supra* note 97, at 133.

107. *Id.* at 134.

108. For a discussion of collective memory, see generally IWONA IRWIN-ZARECKA, FRAMES OF REMEMBRANCE: THE DYNAMICS OF COLLECTIVE MEMORY

If the Constitution is part of the way in which we develop collective memory, then lawyers, judges, and citizens, when they interpret the Constitution, are also engaged in the task of creating and reflecting our social reality.

> [W]hen lawyers interpret the Constitution, they are contributing to the stock of narratives that, passed from generation to generation, constitute our civic identity, norms, and purposes. Judicial decisions are thus products of social memory; at the same time they are one of the many social institutions that produce social memory.[109]

These educative,[110] expressive,[111] and narrative[112] roles may be present even in circumstances when the courts' power to enforce the Constitution is weak.[113] For example, the U.S.

(1994), and works cited therein.

109. Siegel, *supra* note 97, at 135.

110. *See, e.g.*, Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952) (arguing that the "Supreme Court is, among other things, an educational body, and the Justices are inevitably teachers in a vital national seminar"); Robin West, *Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43, 103 (1990) (commenting upon "the educative role of Supreme Court opinions"). Although some have argued against the idea that the Supreme Court serves an educative role, *see, e.g.*, GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 131 (1991) ("Most Americans neither follow Supreme Court decisions nor understand the Court's constitutional role. It is not surprising, then, that change in public opinion appears to be oblivious to the Court."), such a position is less persuasive if we consider the educational value as stretching over a longer period of time. *See, e.g.*, Walter F. Murphy & Joseph Tanenhaus, *Publicity, Public Opinion, and the Court*, 84 NW. U. L. REV. 985, 1021–22 (1990) (disclaiming that while their studies do not sculpt "a Court that could change most people's minds overnight—or even during the Justices' lifetimes . . . the Court can play a constrained role in making controversial public policies more acceptable, make marginal changes in alignments and, perhaps as important, keep a large portion of the flock together."). For a thoughtful discussion of the question, see generally Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. REV. 961 (1992).

111. *See, e.g.*, Milton C. Regan, Jr., *How Does Law Matter?*, 1 GREEN BAG 2D 265, 265 (1998).

> An expressive account of law directs attention to law's role in proclaiming social norms. Such norms provide a vocabulary of judgment that helps constitute everyday life as a world of distinct human meaning. If we expand our vision of law to take this function into account, we will have a richer sense of the complex relationship between law and culture.

Id.

112. *See* Siegel, *supra* note 97, at 133–35.

113. *See, e.g.*, Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 CORNELL L. REV. 523 (1997) (arguing that, even if American courts lack the capacity to enforce a constitutional right to work, there is still

Supreme Court's declaration in *Brown v. Board of Education*[114] that racially-segregated schools were inherently unequal had significant symbolic value, even though legally-enforced segregation persisted for many years,[115] and *de facto* segregation still exists today.

Of course, some may justly believe that symbolic statements are woefully insufficient when true enforcement is necessary, but that does not mean that symbolic statements are not independently valuable. Indeed, "[a]lthough actual implementation of school desegregation took many years, the Supreme Court's decision [in *Brown*] constituted an important symbolic statement that could call attention to injustice, confer legitimacy upon civil rights activists, and encourage political mobilization against discrimination."[116] As Laurence Tribe has pointed out, also in the context of race, the Supreme Court can use its "rights-declaration powers" to help change attitudes about social issues such as "ghettoization."[117] Tribe argues that such declarations, even if largely symbolic, create "positive social and political tension, the sort of tension that makes kids grow up thinking something is wrong, instead of inevitable, about ghettoization."[118]

Thus, particularly when articulating constitutional values, the position of courts within our society provides them "with unique legitimacy to advance ideas symbolically."[119] By focusing on symbolic power, we may see that courts do not simply adjudicate disputes or balance incentives and disincentives for behavior. Rather, they "help constitute a cultural world by investing it with moral meaning."[120] Part of the role of courts and law is to "express[ ] what is valuable and what is not, what merits praise, and what deserves blame, and what we may rea-

---

value in looking to our basic constitutional principles for guidance on the issue).

114. 347 U.S. 483 (1954).

115. *See* PETER IRONS, THE COURAGE OF THEIR CONVICTIONS 109–10 (1988) ("The Supreme Court's refusal to set deadlines for desegregation invited Southern officials to invent foot-dragging tactics, and frustrated the NAACP lawyers who had struggled for years with cautious and often hostile federal judges, most of them closely tied to [the] local power structures.")

116. Smith, *supra* note 105, at 939.

117. *See* Laurence Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1, 30 (1989).

118. *Id.*

119. Christopher E. Smith, *The Supreme Court and Ethnicity*, 69 OR. L. REV. 797, 845 (1990).

120. Regan, *supra* note 111, at 271.

sonably expect from one another."[121] This symbolic, educative, and expressive role is equally strong, whether the behavior being discussed is "public" or "private." For example, the symbolic importance of *Brown* does not depend on the fact that the schools being discussed happened to be public. *Brown*'s statement about the dangers inherent in a racially-segregated society transcended any distinction between public and private. Similarly, in the cyberspace context, court decisions concerning possible threats to constitutional values from private parties online might well generate the kind of debate and consideration about fundamental policy choices that Lessig urges.[122]

2. Constitutional Adjudication as a Deliberative Forum

In recent decades, much political theory—liberal, communitarian, and civic republican—has focused on the conditions for effective political discourse, deliberation, and decision.[123] These debates are far beyond the scope of this article. Nevertheless, it is worth considering whether courts, particularly

---

121. *Id.*

122. It could be argued that this symbolic, expressive, and educative power would be lessened if more societal behavior were subjected to constitutional scrutiny. It is difficult to know how one would go about proving this point either way. I note, however, that two periods when the United States Supreme Court has treated its role more expansively—the so called *Lochner* era early in the 20th century and the period of expanding judicial protection of individual rights from the 1950s to 1970s—appear to correspond with periods when constitutional decisions have achieved great symbolic power and been the focus of substantial political and social debate.

123. *See, e.g.*, SEYLA BENHABIB, SITUATING THE SELF: GENDER, COMMUNITY AND POSTMODERNISM IN CONTEMPORARY ETHICS (1992); DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL (Seyla Benhabib ed., 1996); WILLIAM GALSTON, LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE (1991); WILLIAM GALSTON, JUSTICE AND THE HUMAN GOOD (1980); JÜRGEN HABERMAS, THEORY OF COMMUNICATIVE ACTION (Thomas McCarthy trans., 1984); JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE (Thomas Burger & Frederick Lawrence trans., 1989); MICHAEL SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY (1996); MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1998); CHARLES TAYLOR ET. AL., MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION (1994); MICHAEL WALZER, SPHERES OF JUSTICE (1983); IRIS YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE (1990); Amy Gutmann, *Communitarian Critics of Liberalism*, 14 PHILOSOPHY & PUBLIC AFFAIRS 308 (Summer 1985).

when they are engaged in constitutional adjudication, may sometimes provide a superior forum for debating and resolving hotly contested political issues.

For example, Michael Selmi, in his careful review[124] of the Supreme Court's decision-making process in *Bakke v. Regents of the University of California*,[125] argues that "the Supreme Court's purported distance from politics allow[ed] it to engage in the [type of] political discussion that John Rawls envisions for the public arena, one where reason, influenced—but not dominated—by ideology, [guides] the Court's decision."[126] As Selmi points out, the *Bakke* Court engaged the nation in a discussion on affirmative action that, to this day, has largely been unavailable in the political arena. The Court carefully surveyed the opinions of groups and individuals from around the country, and then "sought to find some acceptable position—one that would right what the Court perceived as an individual injustice to Allan Bakke, while preserving the ability to use preferences to eradicate the vestiges of discrimination."[127] Although the *Bakke* decision arguably reflected public opinion at the time (and perhaps even today)[128] it is important to realize that the public rarely has reached such a consensus through the political process, where the discussion tends to be captured by the most intransigent advocates at both poles of the debate.[129] Indeed, as Selmi notes, "[e]ven though the political

---

124. *See* Michael Selmi, *The Life of* Bakke*: An Affirmative Action Retrospective*, 87 GEO. L.J. 981 (1999).

125. 438 U.S. 265 (1978).

126. Selmi, *supra* note 124, at 984.

127. *Id.* at 1018.

128. Similarly, though certainly controversial, the Supreme Court's abortion jurisprudence from *Roe v. Wade*, 410 U.S. 113 (1973), to *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), arguably has fashioned a constitutional compromise that reflects the consensus position on this issue within American society.

129. *Compare, e.g.*, TERRY EASTLAND, ENDING AFFIRMATIVE ACTION: THE CASE FOR COLORBLIND JUSTICE (1996) (challenging all affirmative action programs) *and* William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 799-803 (1979) (criticizing *Bakke* and advocating a colorblind policy), *with, e.g.*, BRYAN K. FAIR, NOTES OF A RACIAL CASTE BABY 172–75 (1996) (arguing for unqualified support for affirmative action) *and* Wendy Brown-Scott, *Unpacking the Affirmative Action Rhetoric*, 30 WAKE FOREST L. REV. 801, 814 (1995) (stating that "*Bakke* chilled the potential effectiveness of affirmative action as a tool of inclusion") *and* David M. White, *Culturally Biased Testing and Predictive Invalidity: Putting Them on the Record*, 14 HARV. C.R.-C.L. L. REV. 89 (1979) (criticizing *Bakke* decision for failing to challenge admissions

climate has become seemingly more hostile to affirmative action in recent years, legislatures—particularly Congress—have expressed surprisingly little interest in revisiting or revising affirmative action programs."[130] Instead, legislatures seem content to allow courts to make such judgments.[131]

Thus, although courts are certainly not the only possible forum for articulating fundamental societal values or reaching a consensus on difficult political issues, they may sometimes provide a more satisfying resolution than the political process can. As Owen Fiss has pointed out, unlike legislatures, which "see their primary function in terms of registering the actual, occurrent preferences of the people," courts may be more "ideologically committed [and] institutionally suited to search for the meaning of constitutional values."[132] Because of this difference, Fiss argues, judges may be uniquely qualified to be the final arbiters on issues involving fundamental social values. Moreover, as Selmi's account indicates, "[w]ith its mandate to decide cases and in the absence of clear polarization, the Supreme Court may provide the only hope for reaching an acceptable reasoned political compromise."[133] And again, the power of courts in this regard does not depend on whether the entity being discussed is strictly governmental. The *Bakke* decision would have had much the same function as public discourse, whether the university in question were public or private.

3. The Constitution's Appeal to Moral Principles

Most of the rights-bearing provisions of the United States Constitution are drafted in very broad and abstract language, such as "freedom of speech," "equal protection," "due process,"

---

practices). As Selmi points out, "[a]lthough there have been some exceptions to this polarization, it is far more common that those who care most about the issue have been unwilling to support the *Bakke* position, and instead have devoted their time and attention to fighting the extremes." Selmi, *supra* note 124, at 984 n.20.

130. Selmi, *supra* note 124, at 1019–20.

131. Even the recent California and Washington laws prohibiting the use of preferences were both passed by ballot initiative rather than through legislation. *See* LYDIA CHÁVEZ, THE COLOR BIND 18 (1998) (discussing the California initiative); Stephen A. Holmes, *Victorious Preference Foes Look for New Battlefields*, N.Y. TIMES, Nov. 10, 1998, at A25 (noting that the organizers of the Washington ballot initiative "had stumbled in Congress and legislatures").

132. Owen Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 10 (1979).

133. Selmi, *supra* note 124, at 1020.

and "privileges or immunities of . . . citizenship." Ronald Dworkin has argued that "we all—judges, lawyers, citizens—interpret and apply these abstract clauses on the understanding that they invoke moral principles about political decency and justice."[134] For example, the First Amendment embodies an abstract moral commitment to free expression. When we are faced with a controversial constitutional issue—such as whether the First Amendment permits laws restricting pornography—we must decide how best to honor that commitment. As Dworkin puts it, we "must decide whether the true ground of the moral principle that condemns censorship, in the form in which this principle has been incorporated into American law, extends to the case of pornography."[135] In Dworkin's view, most significant constitutional arguments will inevitably turn on questions of political morality.[136]

Just as importantly, Dworkin argues that constitutional interpretation is disciplined by what he calls "integrity."[137] Thus, judges are not free to import their own particular moral judgments into the Constitution's clauses unless that judgment is "consistent in principle with the structural design of the Constitution as a whole, and also with the dominant lines of past constitutional interpretation by other judges."[138] Accordingly, they must seek to articulate "the best conception of constitutional moral principles . . . that fits the broad story of America's historical record."[139] This idea echoes Justice Cardozo's famous understanding of due process as those "princi-

---

134. RONALD DWORKIN, *The Moral Reading and the Majoritarian Premise*, *in* FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 1, 2 (1996).

135. *Id.*

136. Dworkin recognizes, of course, that a "moral reading is not appropriate to everything a constitution contains." *Id.* at 8. He acknowledges that "[t]he American Constitution includes a great many clauses that are neither particularly abstract nor drafted in the language of moral principle." *Id.* For example, Article II specifies that the President must be at least thirty-five years old, and the Third Amendment states that the government may not quarter soldiers in citizens' homes. Dworkin argues that, although the Third Amendment may have been *inspired* by a moral principle (e.g., privacy), its *content* is not a general principle of privacy. *See id.*

137. *See id.* at 10; *see also* DWORKIN, *supra* note 94, at 225–75.

138. DWORKIN, *supra* note 134, at 10.

139. *Id.* at 11.

ple[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[140]

If this vision is correct, then it may be that we as a people can derive great benefit from having our fundamental societal disputes framed in constitutional terms. Arguments about contentious issues, when cast in the language of the Constitution, encourage a discourse about core philosophical values rather than one rooted in political expediency or rancorous name-calling. Moreover, constitutional interpretation requires us to consider an entire history of national values and commitments. Thus, even in debate we may come to feel more bound to each other and our constitutional tradition than we otherwise would. Instead of simply shouting at each other about whether, for example, burning the American flag is acceptable behavior, we may have a more profitable community discussion when the argument is framed in the more abstract language of our First Amendment jurisprudence. Similarly, in 1997, we as a society engaged in what some might think was a useful societal discussion about the intractable issue of euthanasia, largely because the Supreme Court had agreed to hear the question[141] and the debate was therefore framed in constitutional terms. As Dworkin points out, "individual citizens may be able to exercise the moral responsibilities of citizenship better when final decisions are removed from ordinary politics and assigned to courts, whose decisions are meant to turn on principle, not on the weight of numbers or the balance of political influence."[142]

Even scholars such as Louis Michael Seidman and Mark Tushnet, who are generally skeptical about the societal benefits of constitutional discourse,[143] acknowledge that the mental discipline required to fashion "neutral" constitutional principles can promote "constitutional statesmanship."[144] They suggest that such constitutional debate might

> build political community by changing the perspective of people who advance constitutional argument. Reflective

---

140. Palko v. Connecticut, 302 U.S. 319, 325 (1937) (internal quotation marks omitted).

141. *See* Vacco v. Quill, 521 U.S. 793 (1997).

142. DWORKIN, *supra* note 134, at 30.

143. *See generally* LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES (1996).

144. *See id.* at 197.

> people who submit to this discipline in good faith may come to understand that if circumstances had been a little different—if their parents had a different set of values, for example—they might well find themselves believing just as deeply in what they actually reject as they believe what they now accept.[145]

This vision of maturity, self-knowledge, and tolerance is the promise (though admittedly not always the reality) of constitutional discourse. As Michael J. Perry has argued, through the constitutional dialogue between the Supreme Court and the polity,

> what emerges is a far more self-critical political morality than would otherwise appear, and therefore likely a more mature political morality as well—a morality that is moving (inching?) toward, even though it has not always and everywhere arrived at, right answers, rather than a stagnant or even regressive morality.[146]

From this perspective, we stand to lose quite a bit if our great debates fail to reach the constitutional plateau because of a lack of "state action."

---

145. *Id.* at 198.

146. MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS 113 (1982); *see also* ALEXANDER BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 177 (1970).

> Virtually all important decisions of the Supreme Court are the beginnings of conversations between the Court and the people and their representatives. They are never, at the start, conversations between equals. The Court has an edge, because it initiates things with some immediate action, even if limited. But conversations they are, and to say that the Supreme Court lays down the law of the land is to state the ultimate result, following upon a complex series of events, in some cases, and in others it is a form of speech only.

Id. Similar themes can be found in the work of other commentators. *See, e.g.*, PHILIP BOBBITT, CONSTITUTIONAL FATE: A THEORY OF THE CONSTITUTION 182–83 (1982); Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1047–49 (1984); Wojciech Sadurski, *Conventional Morality and Judicial Standards*, 73 VA. L. REV. 339, 397 (1987). *See generally* Robert F. Nagel, *Rationalism in Constitutional Law*, 4 CONST. COMMENT. 9, 15 (1987). *But see, e.g.*, Earl M. Maltz, *The Supreme Court and the Quality of Political Dialogue*, 5 CONST. COMMENT. 375 (1988) (critiquing such "dialogue theories").

C. *The Intuitive Appeal of Constitutive Constitutionalism*

The argument of constitutive constitutionalism—that we might wish to use the Constitution as a cultural touchstone for resolving more of our disputes as a people—is potentially just as sweeping as abolishing the distinction between public and private, perhaps even more so. Yet it may be more likely to have intuitive appeal than the incoherence critique. Although it is difficult to accept that our private activities are really part of the extended apparatus of the state and its laws, I suspect that most Americans, if questioned, would assume that they possess the rights embodied in the Constitution at all times, and not only when dealing with the government. Indeed, we are apt to use the language of rights in popular discourse even in situations where the dispute concerns only "private" entities. For example, employees often view restrictions on their freedom of expression[147] or invasions of their privacy in the workplace[148] as constitutional issues. In addition, as recently as this year, when a baseball pitcher was suspended for derogatory remarks he made about ethnic and racial minorities, much of the talk concerned whether the punishment violated First Amendment principles, even though Major League Baseball is a non-state entity.[149] Similarly, when large retailers decided to

147. For example, when Disney attempted to crack down on employees with facial hair, one employee with a moustache said, "I'm doing everything in my power to keep it. I'm exercising my constitutional right, which is freedom of expression." *See* Brad Hanson, *Disney Hotel's Hairy 6 Officially Told to Shave*, L.A. TIMES (Orange County), Mar. 22, 1988, pt. 2, at 3.

148. *See, e.g.*, Reid Kanaley, *Somebody's Watching You at Work*, DES MOINES REG, Sept. 20, 1999, at 16 (quoting the director of management studies at the American Management Association as saying: "People naturally assume that they carry their constitutional rights to privacy into the workplace with them, but they don't"); Gwen Carleton, *Somebody's Watching: "Worker Beware" as Companies Crack Down on E-Mail Abuses*, CAP. TIMES (Madison, WI), Apr. 9, 1999, at 1C (quoting a representative of the Electronic Privacy Information Center as saying "[w]e feel that when you enter a workplace you don't give up all your constitutional rights").

149. *See, e.g.*, J.A. Adande, *Now, Baseball Has Spoken: Selig's Action Tramples the 1st Amendment and Does Nothing to Correct the Real Problem Behind Pitcher*, L.A. TIMES, Feb. 1, 2000, at D1 (arguing that Rocker's speech should be controlled by allowing the public to decide whether or not to support the Braves and its players, not through suspension by Major League Baseball); Gerald McGuirk, Letter, *Does Suspension Infringe on Rocker's Right to Speak?*, NEWSDAY, Feb. 16, 2000, at A45 ("If we believe in free speech and other forms of free expression, let's be even-handed in permitting their exercise."). Even a law professor, Alan Dershowitz, while acknowledging that, because of the state action

edit or restrict specific music albums, videos, and magazines because of their content, popular debates about this private "censorship" were framed in a language that was based on intuitions about the content of the Constitution.[150] Finally, although private discrimination and harassment claims are technically brought pursuant to statutes, I suspect that most Americans view them as constitutional claims.

A broader vision of the Constitution's scope may also be more palatable because it is relatively easy for most of us to see that core constitutional values and commitments can be threatened by private entities, and that we need a productive language for debating what to do about such threats. Indeed, concerns about private power run deep in our history, at least since the mid-nineteenth century. As Willard Hurst has argued in the economic arena, although this "society had, through the nineteenth and the first half of the twentieth centuries, a broadly shared faith that a rising material standard of living would make for a better society,"[151] that consensus also condemned "individuals or groups [who] were pursuing private interests in ways that deeply imperiled achievement of a rising standard of living."[152] In this dichotomy, Hurst sees the impetus for antitrust legislation, as well as laws regulating labor, and food, drug, and product safety. We see similar concerns about private power today in the debates about plant closings and corporate citizenship, in the public uneasiness about megamergers, in the debates about campaign finance reform, and in the critical commentary on technology giants like Microsoft and America Online.

But concerns about private power have not been limited to the economic sphere. In our constitutional jurisprudence, too,

---

doctrine, the Constitution permitted Major League Baseball to suspend Rocker, nevertheless argued that the "decision violates the spirit of free speech which animates the First Amendment." Alan Dershowitz, Editorial, *Baseball's Speech Police*, N.Y. TIMES, Feb. 2, 2000, at A21.

150. *See, e.g.*, David Pearl, Letter, *No to Censorship*, THE PLAIN DEALER, Jan. 6, 1997, at 1E ("The bottom line is that Wal-Mart is taking the role as parents, as well as violating the First Amendment of the Constitution."); Anne M. Russell, Editorial, *Free Speech's Weakest Voice, Retailers*, FOLIO, Mar. 1997, at 7 ("The tenets of the First Amendment ring increasingly hollow as retailers like Blockbuster. [sic] Wal-Mart and Diamond Shamrock act as self-appointed censors of video-tapes, CDs and periodicals.").

151. JAMES WILLARD HURST, LAW AND SOCIAL ORDER IN THE UNITED STATES 221 (1977).

152. *Id.* at 222.

the Supreme Court often has expanded the state action doctrine to reach particularly worrisome private activity. Although *Shelley v. Kraemer*[153] is rightly viewed as the broadest Supreme Court reading of "state action" to date, perhaps more relevant to cyberspace is *Amalgamated Food Employees Union v. Logan Valley Plaza.*[154] In that case, the Court determined that the First Amendment protection for peaceful protest extended to privately-owned shopping malls. The Court recognized that "[t]he largescale movement of this country's population from the cities to the suburbs has been accompanied by the advent of the suburban shopping center, typically a cluster of individual retail units on a single large privately owned tract."[155] Given such societal change, the Court concluded that there was a very real threat that private parties, if allowed to exercise their property rights unchecked, could effectively eliminate the First Amendment in the country's primary business districts. Although the Court subsequently backed away from its conclusions in *Logan Valley*,[156] the decision reflects our nation's long-standing fears about private power, particularly when it is clear that private entities might occupy a sphere that we have traditionally assumed to be public.

Finally, there can be little doubt that, even with a stricter application of the state action doctrine, constitutional values nevertheless exert a strong influence on our legislative and judge-made law concerning private activity.[157] For example, the constitutional principle that the government may not discriminate based on race has certainly influenced the enactment and content of statutes prohibiting such discrimination in the private sector.[158] Similarly, modern labor legislation can be

153. 334 U.S. 1 (1948).

154. 391 U.S. 308 (1968).

155. *Id.* at 324.

156. *See* Hudgens v. NLRB, 424 U.S. 507 (1975); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

157. For a discussion of this influence, see William B. Fisch & Richard S. Kay, *The Constitutionalization of Law in the United States*, 46 AM. J. COMP. L. 437, 452–53 (1998). Fisch and Kay point out that, under the German principle of *drittwirkung*, this influence is formalized, so that judicial interpretation of private law rules must take into consideration constitutional values. *See id.* Although such formal influence does not exist in the American system, Fisch and Kay argue that the United States Constitution exerts considerable informal influence on private law legislation and adjudication. *See id.*

158. *See* 1 RODNEY A. SMOLLA, FEDERAL CIVIL RIGHTS ACTS § 1.01[1], at 1–3 (3d ed. 1994).

seen as an attempt to import constitutional principles of free expression and association into the workplace.[159] And many common-law doctrines borrow from constitutional principles such as "due process of law,"[160] the right to privacy and autonomy,[161] or "public policy" grounded in constitutional values.[162] Thus, the idea of applying constitutional norms to private behavior is not as foreign to our national culture as the formal divisions of the state action doctrine might lead one to believe.

CONCLUSION

Debates about the state action doctrine are arising again in the online context largely because we are facing the very real possibility that all of cyberspace will become an effectively private, Constitution-free zone. In cyberspace, one uses privately-owned browsers to access privately-owned online service providers, with messages traveling over privately-owned routers to privately-owned web sites. Moreover, perhaps the single greatest form of control in cyberspace, the governance of the domain name system, is currently in the hands of a private not-for-profit corporation, the Internet Corporation for Assigned Names and Numbers ("ICANN").[163] And, the "code writers" of cyberspace, who have functioned to this point through rela-

---

159. *See* Clyde W. Summers, *The Privatization of Personal Freedoms and Enrichment of Democracy, Some Lessons from Labor Law*, 1986 U. ILL. L. REV. 689. On the interaction of constitutional doctrine and legislation, see generally Ira C. Lupu, *Statutes Revolving in Constitutional Law Orbits*, 79 VA. L. REV. 1 (1993).

160. *See, e.g.*, Ascherman v. St. Francis Mem. Hosp., 119 Cal. Rptr. 507, 510 (Cal. App. 1975) (invoking cases interpreting the Fourteenth Amendment to determine whether private hospital used "fair procedures" in denying application of physician for hospital staff privileges).

161. *See, e.g.*, Fosmire v. Nicoleau, 551 N.E.2d 77, 80–84 (N.Y. 1990) (using due process clause of state constitution to derive common law right to refuse medical treatment).

162. For example, an employer's right to discharge an at-will employee has been held subject to an exception for terminations based on race or gender. *See, e.g.*, Lockhart v. Commonwealth Educ. Systems Corp., 439 S.E.2d 328, 330–32 (Va. 1994). Such a "public policy" exception "cannot be separated from the modern judicial elaboration of the constitutional requirement of 'equal protection of the laws.'" Fisch & Kay, *supra* note 157, at 453.

163. For a critique of ICANN's largely unreviewable power, see generally David G. Post, *Governing Cyberspace, or Where is James Madison When We Need Him?* (visited Oct. 13, 1999) <http://www.temple.edu/lawschool/dpost/comment1.html>.

tively independent bodies of experts setting policy by means of open meetings and consensus decision making,[164] are now at risk of being captured by competitive market interests.[165] Thus, "[w]e are entering a world where code is corporate in a commercial sense, and leaving a world where code was corporate in a very different sense."[166]

As a result of this activity, the hope that cyberspace will be a space where individual liberties and constitutional values are a necessary part of the architecture might rapidly fade unless we are willing to rethink the state action doctrine. As Lessig states:

> If code functions as law, then we are creating the most significant new jurisdiction since the Louisiana Purchase, yet we are building it just outside the Constitution's review. Indeed, we are building it just so that the Constitution will not govern—as if we want to be free of the constraints of value embedded by that tradition.[167]

Why might a broader conception of state action, influenced by the idea of constitutive constitutionalism, be useful? If we return to the *Cyber Promotions* case discussed earlier, we can see that, by applying the state action doctrine, the court was able to resolve the First Amendment claim against AOL without having to engage in any discussion about the role of free expression in cyberspace or the potential encroachment on such freedom by online service providers. Invocation of the state action doctrine, therefore, undoubtedly made the adjudicatory process somewhat easier, but it also muted the court's ability to articulate values, weigh the various competing interests with

---

164. *See, e.g.*, A. Michael Froomkin, *Habermas@discourse.net: Towards a Critical Theory of Cyberspace* (visited Feb. 10, 2000) <http://www.discourse.net/ILSdraft-nov99.pdf> (arguing that the Internet standard-setting process may be the first international rule-making process to fulfill Jürgen Habermas's demanding criteria for legitimate law-making processes). *See also* LESSIG, *supra* note 1, at 207 (describing the Internet Engineering Task Force and other standard-setting organizations as "regulatory bodies whose standards set policy, but they were in one sense disinterested in the outcomes: they wanted to produce nothing more than code that would work").

165. *See* LESSIG, *supra* note 1, at 207 ("We are entering a very different world where code is written within companies; where standards are the product of competition; where standards tied to a dominant standard have advantages.").

166. *Id.*

167. *Id.* at 217.

regard to speech and censorship in cyberspace, and foster societal discussion about the way behavior might be regulated online. In other words, the court was rendered powerless to address any of the issues that, according to Lessig, we as a society most need to debate.

For example, had the court addressed the merits of the case, it would have been forced to consider whether America Online had acquired such a stranglehold on information access that it should be treated as a quasi-public facility or a common carrier that cannot selectively block speech.[168] Conversely, the court might have concluded that the First Amendment speech rights of America Online itself require that it be permitted to exclude speakers as it sees fit.[169] In evaluating these questions, the court likely would have asked whether online service providers—at least with regard to e-mail—are more appropriately thought of as neutral information conduits or as content providers exercising their own editorial control. Such questions and provisional answers might have been useful in focusing societal debate about the nature and power of online service providers.

Similarly, a broader view of the Constitution's scope would reach the private standard-setting bodies—which now function so powerfully (yet so invisibly) to establish the code that regulates cyberspace—and subject them to constitutional norms of fair process and judicial review. This approach might also provide a constitutional forum for debating many of the criticisms leveled at ICANN on account of its claimed lack of public participation and transparent processes.[170]

There are, of course, possible objections that might be raised to this vision of constitutive constitutionalism. For example, some might argue that applying the Constitution more broadly could result in a far greater number of legal disputes being resolved through the *ad hoc* application of a vague balancing calculus.[171] However, although it is certainly possible to

---

168. Such a conclusion might follow the reasoning of *Marsh v. Alabama*, 326 U.S. 501 (1946), and *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968).

169. Such a conclusion might follow the reasoning of *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973).

170. *See, e.g.*, Post, *supra* note 163. *See generally* <http://www.ICANNWatch.org> (visited Feb. 20, 2000).

171. *See, e.g.*, Kay, *supra* note 53, at 340; William P. Marshall, *Diluting*

criticize the use of balancing tests,[172] such tests have the virtue of permitting courts to articulate essential values and principles while at the same time recognizing that applying these principles must necessarily depend on a nuanced examination of the circumstances of each case.[173] As discussed previously, courts are educative and expressive institutions as well as adjudicative bodies; therefore articulating foundational principles can be as important as providing a fixed resolution to possible future cases. Moreover, although the use of such a flexible approach might initially bring uncertainty as to precise constitutional boundaries for "private" behavior, it is likely that, over time, those boundaries would become clearer and more stable as the common law system began to adjudicate cases and the intrinsic limits of precedent began to take hold.

Others might worry that, if constitutional norms are applied to a wider set of activities, the constitutional principles

---

Constitutional Rights: Rethinking "Rethinking State Action," 80 NW. U. L. REV. 558, 563–67 (1985).

172. *See, e.g.*, T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987).

173. While recognizing its dangers, Louis Henkin has articulated the fundamental attraction of a balancing approach:

> Balancing is highly appealing. It provides bridges between the abstractions of principle and the life of facts. It bespeaks moderation and reasonableness, the Golden Mean. It refines the process of judicial review. It softens the rigors of absolutes, makes room for judgment and for sensitivity to differences of degree. It provides an answer, or the way to an answer—sometimes the only answer—to what the Constitution means when the words do not say what it means, to many a constitutional tension or issue not readily resolved without it. The flexibility it provides may have been an important ingredient in making judicial review work and rendering it acceptable.

Louis Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022, 1047 (1978). *see also* Erwin Chemerinsky, *More Is Not Less: A Rejoinder to Professor Marshall*, 80 NW. U. L. REV. 571, 572–73 (1985).

> [T]he fact that there are not easy solutions or determinate answers does not explain why [balancing] is undesirable. . . . [C]ourts constantly choose between competing values in situations where no easy or determinate answers. . . . Upholding equality inevitably sacrifices liberty; ending discrimination eliminates someone's liberty to discriminate. The examples are endless; it is difficult to even think of many important constitutional cases in which a difficult value conflict does not exist.

Id; *see also* Burt Neuborne, *Notes for a Theory of Constrained Balancing in First Amendment Cases*, 38 CASE W. RES. L. REV. 576, 577 (1987–88) (arguing that even in cases seemingly grounded in logic, definition, or categorization, the same elements of judicial choice are in play, though their existence is submerged and unarticulated).

themselves could become watered down.[174] This concern is a real and troubling one. Nevertheless, although I certainly would not advocate the dilution of substantive constitutional rights, I would be prepared to accept that result. It is inevitable that the content of constitutional rights will change over time as the values of the nation change, and the great advantage of this broader conception of the Constitution's scope is that at least the conversation about constitutional values truly will be about those values. The discussion will not be swept off the table by arbitrary application of the state action doctrine, which has the effect of forestalling all debate about the substance of the constitutional norms themselves.

Finally, I recognize, of course, that there are other considerations that might argue in favor of a narrower vision of constitutional adjudication. For example, those who believe courts to be fundamentally anti-democratic might not wish to entrust courts with responsibility for adjudicating even more of our fundamental social and political questions. Others might see a broader conception of constitutional application as a threat to principles of federalism, because federal courts would be empowered to play a greater role in creating national standards. Still others might worry that applying the Constitution to a wider range of activities might result in more constitutional litigation and more uncertainty with respect to legal outcomes, leading to increased costs and decreased efficiency. Complete answers to these objections (which implicate well-developed debates in American constitutional history) are beyond the scope of this article. Nevertheless, I readily acknowledge that for some people (perhaps including judges) such concerns will ultimately outweigh the cultural benefits I have suggested.

The point is not that we should necessarily jettison the state action doctrine, but that, before we can truly analyze the costs and benefits of the doctrine, we must consider the cultural value we as a nation derive from the act of constitutional adjudication. The supposed incoherence of the distinction between public and private is not the only possible objection to the state action doctrine, nor even necessarily the most persua-

---

174. *See, e.g.*, Marshall, *supra* note 171, at 569 (arguing that doing away with the state action doctrine would "'trivialize' the meaning of constitutional protection and thereby weaken the force of a claim of 'true' constitutional violation by overexposure").

sive or the most intuitively appealing argument that might be raised. If we are truly to grapple with the problem of private power, in cyberspace and elsewhere, then we must also consider the Constitution's importance as a constitutive part of our national psyche and the productive role that constitutional adjudication might play as a forum for debating our national dilemmas, articulating our national values, and helping define a national story about the nature of our collective commitments. Only then can a broader debate about the Constitution, state action, and cyberspace truly begin.