

## **First Amendment Architecture: A New Model for Free Speech**

*The right to free speech is meaningless without some place to exercise it. But constitutional scholarship generally overlooks the role of judicial doctrines in ensuring the availability of spaces for speech. Indeed, when scholarship addresses doctrines that are explicitly concerned with speech spaces such as public forums and media or Internet forums, it generally marginalizes these doctrines as “exceptions” to standard First Amendment analysis. Indeed, in response to normative arguments that the First Amendment should be concerned with ample speech spaces, many scholars simply respond with a descriptive claim about what doctrine currently is: the concern for spaces is only peripheral and exceptional. By overlooking or marginalizing decisions about speech spaces, as well as relying on this descriptive characterization of doctrine to reject normative arguments, scholarship has failed to explicate the logic underlying important doctrinal areas and has failed to explicate what these doctrines reveal about the First Amendment’s normative underpinnings.*

*This Article adopts a different interpretive and normative approach. In responding to the usual descriptive assumptions that doctrine only cares about spaces sparingly and exceptionally, the Article identifies and interprets the Court’s role in ensuring, requiring, or permitting government to make spaces available for speech. Across a range of physical and virtual spaces, the Article identifies five persistent judicial principles evident in precedent and practice that require or permit government to ensure spaces to further particular, substantive speech-goals.*

*Further, rather than quarantining these speech-principles as exceptions to the standard analysis, this Article explores the significance of these principles for “core” speech doctrine and theory. The resulting analysis poses fundamental challenges to conventional wisdom about the First Amendment and the normative principles generally believed evident in doctrine. Consequently, the Article provides timely guidance for legislators and judges, particularly for shaping access to the technology-enabled virtual spaces increasingly central to Americans’ discourse, to our liberty, and to our democracy.*

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## Introduction

Imagine an American, Ed, moves to another country. He gets involved in politics, perhaps to support a law that would legalize marijuana, perhaps to support the mayor's recall. Either way, he tries to convince others to join his cause.

He considers taking some pamphlets to a public park or street corner, but all the parks and streets in this imaginary country are private, and their owners forbid such activity. He would mail pamphlets, but postage is expensive and postal service extends only to a few big cities. He would take his cause to virtual spaces, such as the Internet, but the private Internet service providers exercise the right to block or impose surcharges on political websites and emails. He would use his phone to call potential supporters, but phone companies are not subject to U.S.-style "common carrier" rules that would require them to carry all calls without discrimination. He would turn to newspapers, but they can, and most likely will, decide not to publish what he writes; and they can turn down his advertising, even if he could afford to pay their rates. If he could afford to buy a newspaper company, he could not afford to buy the private streets on which to distribute them. He would turn to broadcast stations and cable channels, but he cannot afford their rates either, and no public access channels are available to the public.

Frustrated by these perceived constraints,<sup>1</sup> Ed visits his neighbor and complains, "This country does not value freedom of speech." His neighbor disagrees, and responds as other natives would: "But freedom of speech is essentially perfect here. Our judiciary stamps out all government censorship.<sup>2</sup> Anyone is free to say whatever he wishes, wherever he has a right to speak."

While this hypothetical nation without speech-spaces is not the U.S., our nation would, in fact, resemble this nation if the Supreme Court adopts scholars' "standard" model of the First Amendment. Grounded in venerable cases forbidding censorship, that model is concerned almost exclusively with ensuring that speakers enjoy negative liberty—a freedom from government involvement in

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<sup>1</sup> See LAWRENCE LESSIG, *CODE VERSION 2.0* 120-129 (2006) (categorizing constraints, including law, markets, norms, and architecture); Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 *POLI. SCI. Q.* 470, 470-78(1923) (discussing private coercion, public coercion, and their interrelation).

<sup>2</sup> This cannot be said of the U.S. historically. See, e.g., *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705, 2731 (2010); *United States v. O'Brien*, 391 U.S. 367, 386 (1968); *Dennis v. United States*, 341 U.S. 494, 516-17 (1951); *Debs v. United States*, 249 U.S. 211, 214-15 (1919); *Schenck v. United States*, 249 U.S. 47, 52-53 (1919); GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM*, *passim* (2004); LAURENCE H. TRIBE, *CONSTITUTIONAL CHOICES* 190-92 (1985).

speech.<sup>3</sup> The scholars' "standard" solution in most cases is simple enough: government should stay out entirely.<sup>4</sup>

Our nation is not Ed's primarily because of what scholars consider to be judicial "exceptions" to the standard negative-liberty model.<sup>5</sup> Those exceptions play an incredibly important practical role in ensuring that Americans can access spaces for speech. But scholarship treats the doctrines as a patchwork of *sui generis* exceptions, without unifying principles, while suggesting that few of the exceptions are even justifiable.<sup>6</sup>

Some exceptions, in fact, require the other branches to ensure access to spaces. Scholars consider the traditional public forum doctrine, which grants individuals affirmative access to spaces such as streets and public parks, to be an "exception" to the negative-liberty model for thinking about the First Amendment.<sup>7</sup> It is an exception because courts affirmatively require traditional public forums to be open for speakers. To this day, they remain important speech areas not merely for crackpots, but also for politically consequential Tea Parties gathering in Washington, DC, and teachers' unions gathering in Madison, Wisconsin.<sup>8</sup>

Other exceptions do not entail the judiciary *requiring* spaces, but entail the judiciary merely *permitting* government to open up spaces for public discourse. That is, despite constitutional objections, government can pass laws providing access to additional spaces beyond traditional public forums—both physical and virtual<sup>9</sup>, on public *and* private property. These spaces include shopping malls,

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<sup>3</sup> See Isaiah Berlin, *Two Concepts of Liberty*, in ISIAH BERLIN, *FOUR ESSAYS ON LIBERTY* 118-72 (1969); Benjamin Constant, *The Liberty of the Ancients Compared with That of the Moderns* (1820), in *POLITICAL WRITINGS* 309, 316 (Biancamaria Fontana trans. & ed., 1988); cf. Hale, *supra* note 1, at 470-78 (suggesting negative liberty rests on positive liberty).

<sup>4</sup> See *infra* notes 49-74 and accompanying text.

<sup>5</sup> Cf. Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2344-45 (1990) ("The conventional wisdom stubbornly explains all [conflicting examples] as exceptions which prove the rule . . . . In its insistence on categorizing and then dismissing whole categories of government obligation, the rule obscures the correct focus of constitutional discourse: the requisites of the Constitution.") (citations omitted).

<sup>6</sup> For scholarship concerned with spaces, however, see Thomas P. Crocker, *Displacing Dissent: The Role of "Place" in First Amendment Jurisprudence*, 75 FORDHAM L. REV. 2587, 2588-89 (2007) (focusing on content-neutral regulation of physical spaces); Timothy Zick, *Space, Place, and Speech: The Expressive Topography*, 74 GEO. WASH. L. REV. 439, 439-40 (2006) ("In terms of the First Amendment, 'place' is dramatically undertheorized.") (focusing on the expressive value of places).

<sup>7</sup> See *infra* notes 51-52 and accompanying text.

<sup>8</sup> See, e.g., Stephanie Condon, *Koch-backed Group, Tea Party Mobilize in Wisconsin*, CBS NEWS, Feb. 23, 2011.

<sup>9</sup> For our purposes, "virtual" spaces are those that connect speakers through by a medium: a phone wire, a wireless signal, or the postal service. See e.g., Jack M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 412 (referring to

phone networks, cable networks, and wireless networks, among others. Despite the negative-liberty model's requirement that government not interfere with speakers' decisions and respect their negative liberty, judicial "exceptions" have permitted government interference to ensure affirmative access to even privately owned spaces. There are doctrinal exceptions for regulating access to phone systems, to broadcast systems, to cable systems, and to shopping malls, although different exceptions apply to each space.<sup>10</sup> It remains unclear which of these exceptions, if any, will apply to the nation's increasingly dominant space for discourse—the Internet. Nor does the negative-liberty model suggest a logic for figuring out this question.<sup>11</sup>

In sum, the doctrine about spaces is a messy collection of exceptions to a negative-liberty model that would otherwise require no affirmative access to spaces, nor permit government to open privately owned spaces to speech in ways potentially interfering with negative liberty. With no remotely coherent alternative model, scholars urge the courts to accept the negative-liberty model and extend it to all new spaces and technologies.<sup>12</sup>

The stakes of adopting the negative-liberty model are both timely and significant. Whenever the Court accepts the negative-liberty model, it can drastically limit the speech spaces available to average Americans, including on our most significant new spaces for speech.<sup>13</sup> In December, 2010, the Federal Communications Commission adopted a "network neutrality" rule.<sup>14</sup> This rule prohibits phone and cable companies from blocking, or discriminating among, websites and online software.<sup>15</sup> That is, it aims to ensure that all Americans can access the "cyber"-spaces that are increasingly central to how Americans speak with friends, seek out information, and organize politically without interference (or "editing") by other speakers—the phone or cable company. Largely because of network neutrality's role in ensuring access to Internet spaces, U.S. Senators and (some) legal scholars assert that network neutrality furthers free speech goals and

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"modern technological equivalents of traditional public forums—for example, radio and television"); Mark A. Lemley, *Place and Cyberspace*, 91 CAL. L. REV. 521, 521-23 (2003).

<sup>10</sup> See *infra* notes 53-54 and accompanying text.

<sup>11</sup> John Schwartz, *Shouting Porn! on a Crowded Net; At the Supreme Court, Nine Justices In Search of a Metaphor*, WASH. POST, March 30, 1997, at C01 (describing oral argument where Justices sought a doctrinal analogy for the Internet).

<sup>12</sup> See *infra* notes 38-43 and accompany text.

<sup>13</sup> See, e.g., PAUL STARR, *THE CREATION OF THE MEDIA* 1-2 (2004) (defining "constitutive moments" in the evolution of communications technologies, when society responds to and shapes a disruptive new technology); FCC, *CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN* 1-5 (2010), available at <http://www.broadband.gov/plan/>.

<sup>14</sup> *Preserving the Open Internet*, FCC 10-201, 2010 WL 5281676, at \*43-115 (Dec. 23, 2010) [hereinafter *FCC, Open Internet*] (to be published in Fed. Reg. and codified at 47 C.F.R. pt. 8).

<sup>15</sup> *FCC, Open Internet*, 2010 WL 5281676, at 62-80.

is “the First Amendment issue of our time.”<sup>16</sup> The proceedings inspired involvement from over two million citizens, every major consumer group, civil liberties groups like the ACLU, and liberal and conservative churches;<sup>17</sup> in March, 2011, two Senators observed that “[n]o other telecommunications issue has generated the same amount of public debate, legislative and regulatory action, and media attention as net neutrality,” repeated that it was the “free speech issue of our time,” and stated it would remain “the subject of widespread public debate for years to come.”<sup>18</sup>

But, to the standard scholarly model, network neutrality is a First Amendment issue only to the extent that the First Amendment should forbid the government from adopting this rule and from making decisions about the speech of *privately owned* Internet service providers. To its critics, network neutrality is a clear instance of government butting into speech where it should stay out. One of the nation’s leading constitutional scholar and Harvard professor, Laurence Tribe, filed a brief to the FCC,<sup>19</sup> arguing that, while network neutrality might favor nice-sounding goals like equality and redistribution, any government action would conflict with “a central purpose of the First Amendment,” which is “to prevent the government from making just such choices about private speech.”<sup>20</sup> Quite simply, he argues that even if government means well, it must stay out entirely. Professor Tribe is not the only scholar making this argument, even if he is naturally the most notable.<sup>21</sup>

The network neutrality rule, now on appeal, may eventually provide the Supreme Court with the opportunity to determine whether an exception to the

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<sup>16</sup> See Al Franken, *Net Neutrality is Foremost Free Speech Issue of Our Time*, CNN.COM (Aug. 5 2010), [http://articles.cnn.com/2010-08-05/opinion/franken.net.neutrality\\_1\\_net-neutrality-television-networks-cable?\\_s=PM:OPINION](http://articles.cnn.com/2010-08-05/opinion/franken.net.neutrality_1_net-neutrality-television-networks-cable?_s=PM:OPINION); Dawn C. Nunziato, *The First Amendment Issue of Our Time*, 29 YALE L. & POL’Y REV., Dec. 17, 2010, <http://yalelawandpolicy.org/29/the-first-amendment-issue-of-our-time>.

<sup>17</sup> See, e.g., Nicholas Thompson, *Obama vs. McCain: The Wired.com Scorecard*, WIRED.COM (Oct. 12, 2008, 7:15 PM), <http://www.wired.com/epicenter/2008/10/obama-v-mccain/>; *Two Million Strong for Net Neutrality*, SAVE THE INTERNET, [http://act2.freepress.net/letter/two\\_million/](http://act2.freepress.net/letter/two_million/); Ted Hearn, *Cable, Phone, Net Companies Have Spent \$110 Million This Year To Influence Telecom Reform. Was It Worth It?*, MULTICHANNEL NEWS, Oct. 23, 2006, at 14.

<sup>18</sup> Letter from Al Franken & Ron Wyden, United States Senators, to Mary L. Schapiro, Chairman, United States Securities and Exchange Commission (Mar. 9, 2011), at 1, *available at* <http://wyden.senate.gov/download/?id=b053a5d5-afe5-4a48-b9a3-519193006a60>.

<sup>19</sup> Laurence H. Tribe & Thomas C. Goldstein, Proposed “Net Neutrality” Mandates Could Be Counterproductive and Violate the First Amendment 2–4, Exhibit A to Comments of Time Warner Cable, Inc., GN Docket No. 09-191, WC Docket No. 07-52 (FCC), Oct. 19, 2009, *available at* [http://freestatefoundation.org/images/TWC\\_Net\\_Neutrality\\_Violates\\_the\\_First\\_Amendment\\_-\\_Tribe\\_Goldstein.pdf](http://freestatefoundation.org/images/TWC_Net_Neutrality_Violates_the_First_Amendment_-_Tribe_Goldstein.pdf).

<sup>20</sup> *Id.* at 2 (emphasis added).

<sup>21</sup> See *infra* notes 88-90 and accompanying text.

negative-liberty model, or the negative-liberty model itself, will apply to laws providing Americans access to speak on the Internet. The Court could also take steps toward making sense of the doctrine regarding speech spaces.

The stakes of the doctrine are not limited to the Internet, however important the Internet has become for speech. The negative-liberty model would render a wide range of rules ensuring speech access unconstitutional. Recently proposed rules to forbid phone companies from rejecting “controversial” text messages—such as pro-choice messages from a group to its members who opted in to receive the messages<sup>22</sup>—would interfere with the phone company’s speech discretion, inserting government bureaucrats into private speech decisions.<sup>23</sup> Rules requiring cable companies to serve all local residents force them to speak to those they would rather avoid, imposing government values on private speech rather than being perceived as extending speech spaces to all.<sup>24</sup> Indeed, over the last two decades, companies have made similar arguments against dozens of laws meant to ensure access for speakers to speak. According to the negative-liberty model, however noble the goal, these laws contravene what Professor Tribe identifies as a central First Amendment purpose—to keep government out of speech.

This Article disagrees with negative-liberty model, both descriptively and normatively. The doctrine appears to be a mess largely because scholarship has persistently applied the wrong model for thinking about these issues—determining that the “central” purpose governs selected paradigmatic cases, while many important areas of doctrine are mere exceptions that reveal nothing about the First Amendment’s purposes. The model is much like concluding that the universe revolves around the earth, taking the moon as the core, and determining everything else is subject to confused exceptions. Other forces may actually be at work.

In this Article, I propose a better model, one that seeks to identify and defend unifying principles across all the “exceptional” doctrines governing discursive spaces and to explore what those principles say about the First Amendment that the negative-liberty model overlooks. Despite the many exceptional standards, I argue, the Court has generally stumbled in the *same* direction over and over, and in that direction are *particular* free speech principles. While there are some outlier cases, these principles are reflected in considerable precedent and practice. This Article is the first to identify and trace several key principles that appear to animate the Court’s approach to making spaces available

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<sup>22</sup> See Adam Liptak, *Verizon Rejects Text Messages from an Abortion Rights Group*, N.Y. TIMES Sept. 27, 2007, at A1.

<sup>23</sup> See Comments of Verizon Wireless, Petition of Public Knowledge et al., FCC 08-7, March 14, 2008, at 46-58, available at

[http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6519866994](http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519866994).

<sup>24</sup> See *infra* note 284 and accompanying text.

to the public. It follows in the tradition of several seminal First Amendment articles that ground theory at least partially in providing a better descriptive model for a confused area of doctrine.<sup>25</sup> It does so partly to refute the common argument that the First Amendment's purposes, descriptively evidenced in case law, undermine any normative arguments for a constitutional concern with ample speech spaces. The Article demonstrates that these principles should not be considered "exceptional" add-ons but foundational threads in the First Amendment's fabric.

Specifically, the principles identified here *permit* government to make spaces available, whether those spaces are on public or, often, on privately owned spaces. The judiciary, however, generally does not, and at least *should* not, abandon its role in checking government discretion. The principles evident in the exceptions generally reflect a requirement that government ensure additional spaces even-handedly, and that it ensure these spaces to further specific substantive speech purposes. These speech purposes include promoting spaces for all speakers, specifically for local speakers or for national speakers, for diverse and antagonistic speakers, and to rural and impoverished speakers, so all have some minimal speech spaces to contribute to our democracy. I refer to these principles simply as architectural principles, as they concern the availability of speech spaces, and the conditions of their availability.

In addition to setting out this model and detailing evidence demonstrating that courts have implicitly followed it, I explore the normative implications of the model. I demonstrate that these principles lead to outcomes furthering both democracy and autonomy—the two most-widely accepted rationales underlying the free-speech guarantee. Further, while scholarship often debates important affirmative or egalitarian values in precedent,<sup>26</sup> the analysis makes an important theoretical contribution by highlighting and briefly exploring overlooked values, such as the value of legislative discretion in implementing constitutional norms as well as judicial concern with *sufficiency*, if not with equality.<sup>27</sup>

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<sup>25</sup> See, e.g., DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 7, 17 (1997) (characterizing Zechariah Chafee's seminal 1920s scholarship as "disingenuous," reflecting "creative misrepresentation of legal history"); Ronald A. Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, 34 UCLA L. REV. 1405, 1407 nn. 4-8 (1987) (and sources cited therein) (discussing "precedentially grounded work"); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414-505 (1996) (interpreting First Amendment doctrine to reflect a concern with governmental motive); Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 13; Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1768 (2004); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM & MARY L. REV. 189, 190-200 (1983).

<sup>26</sup> See *infra* notes 59-65 and accompanying text.

<sup>27</sup> See *infra* notes 292-303 and accompanying text.

The next Part provides necessary background, including a discussion of spaces and of the negative-liberty model. Part II provides a detailed interpretive analysis of the practice and precedents reflecting the core architectural principles. It marshals evidence across a range of spaces and rules. Finally, Part III discusses normative implications for doctrine and theory and argues that adherence to the principles furthers First Amendment values.

## I. The Negative-liberty Model and Its Discontents

This Part sets forth what many believe to be the First Amendment's negative-liberty model. It also sketches some of its discontents—the many widely acknowledged “exceptions” to the model.

### A. The Model's Paradigm and Core Principles

We can sketch a negative-liberty model in broad outlines that has fairly wide acceptance.<sup>28</sup> With roots in Zechariah Chafee's work in the 1920s, this model rests on descriptive and interpretive assumptions about precedent.<sup>29</sup> These descriptive assumptions often match scholars' normative preferences.

Like many doctrinal models, the negative-liberty model begins with paradigm cases. From these paradigm cases, scholarship infers principles underlying them. As these principles derive from paradigm cases, not exceptional cases, these principles are seen as the “core” principles underlying First Amendment doctrine generally, rather than merely underlying the few selected cases. Armed with core principles, scholars can then normatively evaluate other cases, to determine if they conform to the “core” First Amendment principles embodied in the selected cases. As a result, normative analysis rests in no small part on the selection of paradigm cases and on choosing their core principles. In applying these principles, cases that fail to conform to them are “exceptional,” meaning they are likely incorrect, unless some exceptional principle can justify them.<sup>30</sup>

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<sup>28</sup> This outline necessarily simplifies a difficult, complex doctrine. See, e.g., *TRIBE*, *supra* note 2, at 220 (“[C]onstitutional protection of free speech emerges as a patchwork quilt of exceptions.”); Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 *WM. & MARY L. REV.* 267, 278 (1991) (“As any constitutional lawyer knows, first amendment doctrine is neither clear nor logical.”).

<sup>29</sup> See, e.g., Charles Barzun, *Politics or Principle? Zechariah Chafee and the Social Interest In Free Speech*, 2007 *BYU L. REV.* 259, 260 n.5 (and sources cited therein).

<sup>30</sup> See Mark Tushnet, *Renormalizing Bush v Gore: An Anticipatory Intellectual History*, 90 *GEO. L.J.* 113, 114-16 (2001).

The standard First Amendment model, as evidenced both in casebooks and scholarship,<sup>31</sup> selects as paradigm cases those involving government silencing an offensive of subversive speaker, generally because of speaker's speech content. In the cases, government silences a dissenter,<sup>32</sup> or a bigot,<sup>33</sup> or a flag-burner.<sup>34</sup> Of course, this dissenter is speaking at some *place* – usually a traditional public forum like a public park – but her speech space is usually of secondary concern in these cases. Instead, the court's role in striking down government action targeted at the speaker because of her content is of primary concern.

From these offensive-speech cases, scholars infer a set of principles. While these principles come at varying levels of abstraction, including a preference at the most abstract levels for democracy<sup>35</sup> and/or<sup>36</sup> autonomy,<sup>37</sup> the most important principles for doctrine are more specific or “middle-level” principles applied by courts and scholars.<sup>38</sup> The most important middle-level principle includes negative-liberty (either judicial or legislative). The model's other principles can be seen as corollaries of the negative liberty: (1) government distrust, (2) value-neutrality, (3) anti-redistribution, and (4) a strict public/private distinction, often conceived as being tied to property rights.

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<sup>31</sup> See Ammori, *Curriculum*, *supra* note 87, at 97-122.

<sup>32</sup> See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 444-47 (1969); *Cohen v. California*, 403 U.S. 15, 16 (1971).

<sup>33</sup> *R.A.V. v. St. Paul*, 505 U.S. 377, 379-80 (1992).

<sup>34</sup> *Texas v. Johnson*, 491 U.S. 397, 397 (1989).

<sup>35</sup> See, e.g., BAKER, MARKETS, *supra* note 65, at 129-54 (discussing four categories of democratic theories); ROBERT A. DAHL, ON DEMOCRACY 37-43, 189-91, 196-200 (1998); DAVID HELD, MODELS OF DEMOCRACY, *passim* (3d. ed. 2006); Martin H. Redish & Abby Marie Mollen, *Understanding Post's and Meiklejohn's Mistakes: The Central Role of Adversary Democracy in the Theory of Free Expression*, 103 NW. U. L. REV. 1303, 1334-32, 1350-70 (2009).

<sup>36</sup> See Robert C. Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 COLO. L. REV. 1109, 1111-19 (1993) (discussing the relation between autonomy and democracy); Lawrence B. Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 NW. U. L. REV. 54, 68-86 (1989) (discussing different theories advanced to underlie freedom of speech).

<sup>37</sup> See BENKLER, *supra* note 65, at 165, 176-211; Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 876 (1994) (“Autonomy, however, is a protean concept, which means different things to different people.”); see also *id.* at 880, 883-84, 890; Yochai Benkler, *Siren Songs and Amish Children: Autonomy, Information, and Law*, 76 N.Y.U. L. REV. 23, 31-40 (2001) [hereinafter Benkler, *Autonomy*].

<sup>38</sup> Lillian BeVier, *Rehabilitating Public Forum Doctrine: In Defense of Categories*, 1992 SUP. CT. REV. 79, 121-122 [hereinafter BeVier, *Public Forum*] (characterizing these as “middle-level questions” on “an analytical tier between broad theory and narrow doctrine”); Heather K. Gerken, *The Costs and Causes of Minimalism in Voting Cases: Baker v. Carr and Its Progeny*, 80 N.C. L. REV. 1411, 1414 (2002) (using the terms “intermediary theories” or “mediating principles”); Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 Harv. L. Rev. 1733, 1735-36 (1995).

Each of the principles suggests, among other things, that the First Amendment should be indifferent towards the availability of speech spaces.

Paradigm cases suggest a negative liberty. Indeed, scholars commonly claim that negative liberty is a, or *the*, core First Amendment principle.<sup>39</sup> In Frederick Schauer's words, "the prevailing doctrinal structure embodies a series of clear choices in favor of negative rights and against positive rights."<sup>40</sup> Negative liberty is the freedom *from* government action. Affirmative or positive liberties are freedoms *to* particular outcomes, and sometimes require government action to effectuate. In the paradigmatic cases, if government just leaves everyone alone, diverse speakers can speak. In these cases, affirmative government action appears both unnecessary and unhelpful (though perhaps present<sup>41</sup>).

Scholars suggest two conceptions of negative liberty. Negative liberty may simply limit the judicial branch, forbidding the judiciary from imposing affirmative obligations based on the Constitution alone. For example, absent legislation, judges would not require government agencies, shopping mall owners,

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<sup>39</sup> See, e.g., Lillian R. BeVier, *The First Amendment on the Tracks: Should Justice Breyer Be at the Switch?*, 89 MINN. L. REV. 1280, 1280 (2005) [hereinafter BeVier, *Breyer*] ("Yet, despite the doctrinal and scholarly cacophony, ... [the] cases embodied a negative conception of the Amendment."); BeVier, *Public Forum*, *supra* note 38, at 102-12; Kagan, *supra* note 25, at 464-72; Martin H. Redish & Kirk J. Kaludis, *The Right of Expressive Access in First Amendment Theory: Redistributive Values and the Democratic Dilemma*, 93 NW. U. L. REV. 1083, 1083-89 (1999); Geoffrey R. Stone, *Imagining a Free Press*, 90 MICH. L. REV. 1246, 1247 (1992); Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 155-63 (2010) [hereinafter Sullivan, *Two Concepts*]; Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 667 (1997) ("The norm in political speech is negative liberty: freedom of exchange, against a backdrop of unequal distribution of resources"); Geoffrey R. Stone, *Autonomy and Distrust*, 64 U. COLO. L. REV. 1171, 1171 (1993) [hereinafter Stone, *Autonomy*] (concluding that the Court has adopted a doctrinal model that "combines the concern with autonomy with a deep distrust of government efforts to regulate public debate" rather than a "collectivist" concern for improving public debate, "now in vogue among academics"); Ronald Dworkin, *Liberty and Pornography*, N.Y. REV. BOOKS, Aug. 15, 1991, at 12 (characterizing freedom of speech as a negative liberty); John Fee, *Speech Discrimination*, 85 B.U. L. REV. 1103, 1120-22 (discussing scholarship claiming that the central claim of the First Amendment is "anti-discrimination" rather than "consciously promoting the value of speech"); Gregory P. Magarian, *Regulating Political Parties Under a "Public Rights" First Amendment*, 44 WM. & MARY L. REV. 1939, 1943 (2003) ("The present Court ... treats the freedom of expression ... as private, negative rights intended to shield individual autonomy against government regulation.").

<sup>40</sup> Frederick Schauer, *Hohfeld's First Amendment*, 76 GEO. WASH. L. REV. 914, 915 (2008) [hereinafter Schauer, *Hohfeld's*]. See also Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803, 1806-07 (1999) ("[I]t is plainly true that a negative conception of the First Amendment generally, and freedom of speech in particular, have held sway, both in the literature and in the case law, over the past several decades.").

<sup>41</sup> Access to a space *may* rest on an affirmative liberty conferred by the public forum doctrine, which requires certain government spaces open for all, but scholars characterize the protection in these cases as reflecting protection of negative liberty.

or Internet access providers to open property to other speakers.<sup>42</sup> The second conception of negative liberty would (also) forbid the political branches from imposing affirmative obligations on a private actor through sub-constitutional law, including legislation or rules. For example, not only would judges not require access to shopping malls or Internet access networks, but they would also forbid legislatures from passing laws to supply that access.<sup>43</sup> Such laws would violate the negative liberty of individuals to engage in speech without government interference, however well-meaning.

Alongside negative liberty, scholars infer corollaries.

The first is a principle of government distrust, rather than deference to or trust in government decision-making.<sup>44</sup> In the paradigm cases, government is stifling criticism of its policies, often to shield elected officials from criticism and obstruct political change. Government officials have an incentive to entrench themselves, and the paradigm cases of flag-burning and hate speech reveal no pro-speech argument for government intervention. As a result, the cases reflect a principle that government action is, and should be, distrusted rather than deferred to.

Second, the paradigm cases suggest judges should impose a broad value-neutrality on government. That is, government should lack the power to impose its values on private speakers seeking to burn flags or protest funerals. Scholars often interpret doctrine to require that speakers, not government, should determine what speech is valuable.<sup>45</sup>

Third, government cannot “redistribute” speech opportunities or resources. If government “redistributes” speech rights, for example, by taking pamphlets from one speaker to give to another, this action likely reflects unneeded and unwarranted intervention, suppression, and preferences.<sup>46</sup>

Fourth, negative liberty assumes a public/private distinction generally tied to property rights.<sup>47</sup> After all, negative liberty and its corollaries all point towards keeping government out of private speech decisions. Property can often, even if imperfectly, reflect the divide between public and private; burdens on property can reflect burdens on speech. For example, if government burdens a speaker’s property rights in pamphlets (with a tax) or flags (by decreeing all flags are “property” of the government), the burden on *speech* is sometimes apparent.

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<sup>42</sup> Cf. *Hudgens v. National Labor Relations Board*, 424 U.S. 507, 513, 520–21, (1976).

<sup>43</sup> Cf. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980).

<sup>44</sup> See Stone, *Autonomy*, *supra* note 39, at 1171.

<sup>45</sup> See Redish & Kaludis, *supra* note 39, at 1108.

<sup>46</sup> See Kagan, *supra* note 25, at 464–72.

<sup>47</sup> See generally Lillian Bevier & John Harrison, *The State Action Principle and Its Critics*, 96 VA. L. REV. 1767, 1774–85 (2010).

## B. Discontents: Exceptions and Competing Models

Armed with core normative principles, scholars can naturally judge *other* decisions, even those that appear dissimilar from the initial censorship cases.<sup>48</sup> Meanwhile, some cases conflict with core principles. Scholars can decide that the conflicting case reveals something to be incorporated into a more textured understanding of the First Amendment.<sup>49</sup> Or scholars can conclude that the conflicting case is incorrect or is merely an exception to be limited to special circumstances. Scholars sometimes suggest that the *principles* invoked in an exceptional decision are just as wrong as the holdings, even though scholars do not discard all principles—such as content-neutrality—merely because the Court applied the principle wrongly in a few decisions.<sup>50</sup>

As a practical matter, however, the exceptions to the negative-liberty model would strike most people as anything but “standard.” According to leading theorists, they include the “entrenched” traditional public forum doctrine,<sup>51</sup> which requires government to open up particular government-owned spaces, from parks to public streets to spaces outside government buildings.<sup>52</sup> They also include

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<sup>48</sup> These include campaign finance case *Buckley v. Valeo*, 424 U.S. 1 (1976), newspaper right-to-reply case *Miami Herald v. Tornillo*, 418 U.S. 241 (1974), and cable must-carry cases *Turner Broad. Sys., Inc. v. FCC (Turner I)*, 512 U.S. 622 (1994); *Turner Broad. Sys., Inc. v. FCC (Turner II)*, 520 U.S. 180 (1997). We discuss them all later. See *infra* notes 294-300, 369-381 and accompanying text.

<sup>49</sup> Redish & Kaludis, *supra* note 39, at 1105-13.

<sup>50</sup> See *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968) (applying content-neutral test to law likely designed to target content).

<sup>51</sup> Massey, *supra* note 85, at 313; BeVier, *Public Forum*, *supra* note 38, at 113-114.

<sup>52</sup> See, e.g., BeVier, *Breyer*, *supra* note 39, at 1285 (“The public forum doctrine is the only significant exception to the consistent view that the Amendment does not give citizens affirmative claims to government’s resources. Despite the well-entrenched nature of the public forum doctrine, its First Amendment roots are surprisingly obscure.”); Massey, *supra* note 85, at 313 (describing traditional public forum doctrine as a mere “nod to the affirmative theory,” but the “rest of the doctrine” bows to a negative theory); Schauer, *Hohfeld’s*, *supra* note 39, at 915 (noting “perhaps the significant exception of the public forum doctrine” to a negative-liberty rule); Kathleen M. Sullivan, *Constitutionalizing Women’s Equality*, 90 CAL. L. REV. 735, 759 (2002) (“The American constitutional tradition generally provides for negative rights only, and excludes positive rights (with limited exceptions, such as the First Amendment’s effectively compelled subsidy of speech in the public forum).” See also Guy E. Carmi, *Dignity--The Enemy from Within: A Theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification*, 9 U. PA. J. CONST. L. 957, 960, 986, 995 (2007) (“The First Amendment is distinctly perceived as protecting a negative right. ... There are slight exceptions to this rule such as the Public Forum Doctrine ...”); Alan Trammell, Note, *The Cabining of Rosenberger: Locke v. Davey and the Broad Nondiscrimination Principle that Never Was*, 92 VA. L. REV. 1957, 1962 (2006) (“The public forum doctrine is an exception to the axiom that the Free Speech Clause confers only negative rights.”).

newer speech spaces.<sup>53</sup> Broadcasting, the nation's primary news and entertainment medium for decades, is an acknowledged "exception" to scholars' standard doctrine, unable to be integrated into a doctrinal framework.<sup>54</sup> Cable television is at least a partial exception.<sup>55</sup> Regulations ensuring access to phone lines is an exception, rarely discussed except to point out the minimal constitutional scrutiny of law burdening phone companies, despite the phone's importance as a speech medium.<sup>56</sup> Access to the Internet, provided by both phone and cable companies, may be an exception similar to the phone exception or similar to the (different) cable exception.<sup>57</sup> The postal service's enormous effect on newspapers, protecting some papers and harming others, is also an exception, supposedly permitted because it involved government property, though many private networks also involve government property.<sup>58</sup> In short, "exceptions" to doctrine somehow govern our most important physical and virtual speech spaces.

These exceptions lead to competing models. While not identical,<sup>59</sup> scholarly models are consistent in contrasting an (operative) negative liberty model with an (exceptional) affirmative model or equality model. Kathleen Sullivan discusses an exceptional "equality" model and an increasingly dominant "liberty" model.<sup>60</sup> Calvin Massey refers to an inoperative "affirmative theory" and an increasingly operative "negative theory."<sup>61</sup> Lillian BeVier refers to an affirmative

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<sup>53</sup> See, e.g., Ammori, *Curriculum*, *supra* note 87, at 97-121; Matthew L. Spitzer, *The Constitutionality of Licensing Broadcasters*, 64 N.Y.U. L. REV. 990, 993 (1989) ("Major exceptions to a libertarian view of freedom of speech exist in the law, and broadcasting probably provides the most notable example."); Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common With Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. REV. 1, 35 (2000); William Van Alstyne, *The Mobius Strip of the First Amendment*, 29 S. C. L. REV. 539, 574-75 (1978); Yoo, *Rise*, *supra* note 42, at 263; Yoo, *Architectural*, *supra* note 42, at 713. For a justification of the exception, see Lee C. Bollinger, *Freedom of the Press & Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 Mich. L. Rev. 1, 1-10, 17-26 (1976).

<sup>54</sup> See Baker, *Turner*, *supra* note 65, at 99-105; Bollinger, *supra* note 53, at 17-26.

<sup>55</sup> Kagan, *supra* note 25, at 464 (concluding the dissent better conforms to the apparent negative-liberty model).

<sup>56</sup> See ITHIEL DE SOLA POOL, *TECHNOLOGIES OF FREEDOM 2* (1983).

<sup>57</sup> See Stuart Minor Benjamin, *Transmitting, Editing, and Communicating: Determining What "The Freedom of Speech" Encompasses*, 60 DUKE L. J. 1673, 1686 (2011).

<sup>58</sup> Copyright is also an exception, violating *Buckley* anti-redistribution phrase, as it redistributes speech power and silences some for the benefit of others. See Tushnet, *supra* note 53, at 35-47, 60-63.

<sup>59</sup> Sullivan classifies a neutrality principle with the more affirmative vision, while Massey and BeVier classify neutrality with negative liberty. Sullivan, *Two Concepts*, *supra* note 39, at 146-155; Massey, *supra* note 85, at 313; BeVier *Public Forum*, *supra* note 38, at 102.

<sup>60</sup> Sullivan, *Two Concepts*, *supra* note 39, at 146-163 (discussing these conceptions in light of campaign finance decisions).

<sup>61</sup> Massey, *supra* note 85, at 309.

“Enhancement Model” and negative “Distortion Model.”<sup>62</sup> Daryl Levinson refers to “civic republican” and “negative liberty” visions,<sup>63</sup> and John Fee refers to “speech maximizing” and “anti-discrimination” values.<sup>64</sup>

The “exceptional” models rely not on negative liberty and its corollaries but on exceptional principles—affirmative rights, equalizing speech, enhancing discourse. Advocates for the exceptional models include some of the most highly regarded theorists in academia, including Jerome Barron, Owen Fiss, C. Edwin Baker, Cass Sunstein, Yochai Benkler, and Jack Balkin.<sup>65</sup> Yet the common response to their model is straight-forward: it conflicts with “real” First Amendment law reflected in the paradigm cases and the core principles.

### C. Logical Fallacies Underlying the Model

This usual method of rejecting competing models rests on two logical fallacies. One is more understandable for doctrinal analysis (an is-ought fallacy), and the other is more problematic (an inductive fallacy).

First, someone engages in an “is-ought” fallacy when arguing something “ought” to be simply because it “is.”<sup>66</sup> One may argue that a law *ought* to be

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<sup>62</sup> Bevier, *Public Forum*, *supra* note 38, at 101 (defining an affirmative model as “concerned with how much speech takes place in society and with the overall quality of public debate.”).

<sup>63</sup> Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311, 1363 (2002).

<sup>64</sup> Fee, *supra* note 39, at 1107-9, 1113-16.

<sup>65</sup> See e.g., C. EDWIN BAKER, MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS 124-162 (2006) [hereinafter BAKER, OWNERSHIP]; C. EDWIN BAKER, MEDIA, MARKETS, AND DEMOCRACY 7-62 (2001) [hereinafter BAKER, MARKETS]; YOCHAI BENKLER, THE WEALTH OF NETWORKS 133-176 (2005); ZECHARIAH CHAFEE, JR., GOVERNMENT AND MASS COMMUNICATIONS (1947); OWEN FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER 142-59 (1996); LESSIG, *supra* note, at 270-75; CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 53-93 (1993); C. Edwin Baker, *Turner Broadcasting: Content-based Regulation of Persons and Presses*, 1994 SUP. CT. REV. 57, 88 [hereinafter Baker, *Turner*]; Jack M. Balkin, *Media Access: A Question of Design*, 76 GEO. WASH. L. REV. 933, 949 (2008); Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1653-56 (1967); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 359, 364-386 (1999); Michael J. Burstein, Note, *Towards a New Standard for First Amendment Review of Structural Media Regulation*, 79 N.Y.U. L. REV. 1030, 1032 n.10, 1054 (2004); Donald W. Hawthorne & Monroe E. Price, *Rewiring the First Amendment: Meaning, Content and Public Broadcasting*, 12 CARDOZO ARTS & ENT. L.J. 499, 504-510 (1994); Gregory P. Magarian, *The Jurisprudence of Colliding First Amendment Interests: From the Dead End of Neutrality to the Open Road of Participation-Enhancing Review*, 83 NOTRE DAME L. REV. 185, 246-49 (2007). See also Stephen Breyer, *Madison Lecture: Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 253 (2002); Thomas I. Emerson, *The Affirmative Side of the First Amendment*, 15 GA. L. REV. 795, *passim* (1981); Mark Tushnet, *Weak-Form Judicial Review and “Core” Civil Liberties*, 41 HARV. C.R.C.L.L. REV. 1, 2 (2006).

<sup>66</sup> See Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1078-82 (2003) (discussing the is-ought fallacy and an is-ought heuristic).

constitutional simply because it *is* constitutional. The is-ought fallacy, while not logically sound, is common in doctrinal analysis.<sup>67</sup> While scholars propose normative defenses for principles inferred from precedent, the principles receive considerable authority merely by appearing to reflect existing law, which the Supreme Court will likely apply in the future.

Second, someone engages in an inductive fallacy by inducing a conclusion too generally from a small, selective sample. Selecting offensive-speech cases yields a small and deliberately homogenous set, resulting in a high likelihood of making an inductive fallacy in characterizing the rest of doctrine. If the negative-liberty model suffers from an inductive fallacy, then scholars often assert “core principles” improperly derived from a few select cases against other precedent and principles that might be just as normatively defensible. If inferred from a broader group of decisions, the “core” principles may not conflict with so many areas of precedent.

Taken together, these fallacies form the basis for rejecting challenges to the negative-liberty model. Scholars suggest that challenges to the model rest on imagined, not “real,” constitutional law.<sup>68</sup> For this reason, descriptive and interpretive analysis of which constitutional law is “real” and which is “imagined” takes on enough importance to warrant the interpretive efforts of some of our leading First Amendment scholars, including Chafee, Kalven, and Kagan.<sup>69</sup>

To understand how the fallacies rely on descriptive claims to reject normative arguments, we can turn to one example of this common analysis. Martin Redish and Kirk Kaludis published an article that argued rules providing access to privately owned speech spaces—from cable systems to shopping malls—should be unconstitutional.<sup>70</sup> Like other scholars addressing such questions, they reject access by relying consistently on arguments from supposed “core” principles. To refute the notion of government discretion to enact such access, they assert a conflict with the “core” principle of government distrust: “[E]quanimity in the face of government’s insertion of its regulatory power into the marketplace of private expression is grossly inconsistent with the venerable tradition of healthy

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<sup>67</sup> David Hume observed the is-ought problem in “every system of morality, which I have hitherto met with ... .” DAVID HUME, A TREATISE OF HUMAN NATURE 469 (L.A. Selby-Bigge & P.H. Nidditch eds., Oxford Univ. Press 2d ed. 1978) (1739-40). See Volokh, *supra* note 66, at 1102-03 (noting the persistence of the is-ought fallacy over the millennia). Indeed, even in normatively justifying these principles, or any other, scholars generally argue based on what they believe “is” an accepted normative guideline. Cf. Post, *supra* note 28, at 278 (“It requires determined interpretive effort to derive a useful set of constitutional principles by which to evaluate regulations of expression.”).

<sup>68</sup> Massey, *supra* note 85, at 332-33.

<sup>69</sup> See sources cited *supra* note 25.

<sup>70</sup> See Redish & Kaludis, *supra* note 39.

skepticism of the governmental regulation of expression.”<sup>71</sup> They observe that government must “redistribute” speech resources to ensure all can contribute. But, they explain that redistribution violates the “core” principle of value-neutrality: “substantively motivated expressive redistribution would clearly violate the epistemological neutrality that stands at the core of the right of free expression.”<sup>72</sup> Indeed, they assert, “It is standard First Amendment thinking that ... the right of free expression must be implemented on a value-neutral basis.”<sup>73</sup> Quite simply, the First Amendment’s core principles refute the argument for access.

Laurence Tribe’s arguments against network neutrality similarly rely on the is/ought fallacy. He asserts simply that “a central purpose of the First Amendment is to prevent the government from making just such choices about private speech.”<sup>74</sup> This purpose derives from core cases that question government involvement in speech. These core cases conflict with the many exceptions indicating government concern with the adequacy of speech spaces in society.

While leading scholars have posited models competing with the negative-liberty model, they have failed to adequately reject the is/ought fallacy by demonstrating that “real” doctrine *is* concerned with speech spaces. They have also failed to specify the limits and contours of such concern and therefore have failed to defend those contours. The next parts take up this challenge.

## II. The First Amendment’s Influence on Speech Architecture

Partly to respond to the usual argument that deviations from negative liberty are exceptions conflicting with “real” constitutional precedent, this part traces five architectural principles evident in First Amendment precedent and practice, all of which will be subject to normative evaluation in the next part.<sup>75</sup> Some of these principles are explicit, repeatedly invoked in decisions, while others are more implicit.<sup>76</sup> Though other free-speech principles exist,<sup>77</sup> and the government enforcement mechanism always affects constitutionality, we learn

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<sup>71</sup> *Id.* at 1086–87.

<sup>72</sup> *Id.* at 1087.

<sup>73</sup> *Id.* Value-neutrality seems only to require inaction; *not* providing access reflects another value, a value against redistribution, which would violate value-“neutrality” if such neutrality required action.

<sup>74</sup> Tribe & Goldstein, *supra* note 19, at 2.

<sup>75</sup> Other architectural principles could include the treatment of spaces at institutions like universities, access for the press, copyright law, and erogenous zoning for indecency.

<sup>76</sup> Cf. David A. Strauss, *Freedom of Speech and the Common-Law Constitution*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 32, 32–35 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002); Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 *HOFSTRA L. REV.* 487, 491–97 (1980).

<sup>77</sup> See Kagan, *supra* note 25, at 414–416 (tracing one principle, regarding government motive to suppress speech).

much from tracing through and recognizing the significance of a principle—here five—in precedent.

I summarize the principles here. The first is judicially required, but the others are all judicially permissible.

1. *Sufficient, required spaces*: The judiciary requires that individuals have some basic, adequate spaces for autonomy and public discourse necessary in a democracy.
2. *Designated, additional spaces*: Beyond these spaces, the judiciary permits government to open additional spaces for speakers, whether those spaces are publicly or privately owned, and whether for all or particular classes of speakers.
3. *Diverse and antagonistic sources*: The judiciary generally permits government to shape speech spaces so that speakers in those spaces have access to diverse sources of speech.
4. *National and local spaces*: The judiciary permits government to create spaces both for national discourse (to bind a large, heterogeneous nation) and for local discourse, where speakers can address local community concerns.
5. *Universal spaces*: The judiciary permits government to ensure that legislatively determined “necessary” speech spaces are extended to *all* Americans, including those in rural and impoverished areas.

These principles generally complement important anti-censorship requirements of content- and viewpoint-neutrality, though they conflict with notions of pure negative liberty, value-neutrality, pathological government distrust, or broad anti-redistribution.

This section aims more for sweep and scope, rather than explanatory depth of each case. An article resting on in-depth analysis of one or two precedents would also contribute to our understanding of constitutional law and speech spaces. But it would not challenge the usual assertion that—whatever precedents chosen for analysis—the few cases are “exceptions” that must invariably yield to speech doctrine’s “core” principles.

Before tracing the principles, I provide a few notes on the relationship between constitutional law and spatial constraints.

### A. Spatial Constraints and Constitutional Law

Space can constrain individual freedom no less than law, though spatial constraints often result from legal decisions. Following Lawrence Lessig, legal theorists often refer to four broad classes of constraints: markets, law, norms, and architecture.<sup>78</sup> Lessig defines architecture broadly: “the world as I find it, understanding that as I find it, much of this world has been made.”<sup>79</sup> I focus more narrowly on spaces—physical or virtual—and whether they are available for speech. Like other constraints, access to spaces constrains, or “regulates,” people by making certain options more or less burdensome in light of other options.<sup>80</sup> The design of spaces, for example, can constrain potential criminals, reducing crime.<sup>81</sup>

Law can shape access to spaces. Law can ensure access for all races to a private swimming pool or for all speakers to a shopping mall. Such laws impose constraints on the owner of the pool or mall, while conferring freedoms on others.<sup>82</sup>

Constitutional law, like other law, can affect access to speech spaces. For example, scholars debate the role of the public forum doctrine in ensuring speech spaces. Few defend the doctrine;<sup>83</sup> some find it too speech-restrictive and deferential to government to silence individuals,<sup>84</sup> while others find it not deferential enough to government management of its property.<sup>85</sup> All sides seem to find it formalistic and incoherent.<sup>86</sup>

Scholars also debate the relationship between constitutional law and access to virtual spaces. Virtual spaces are central to American discourse and liberty<sup>87</sup>

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<sup>78</sup> See Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 662-65 (1998) [hereinafter “Lessig, *New Chicago*”]; LESSIG, *supra* note 1, at 120-37.

<sup>79</sup> See Lessig, *New Chicago*, *supra* note 78, at 663.

<sup>80</sup> For discussion of varieties of constraints, with sources, including subjective and objective constraints, see Lessig, *New Chicago*, *supra* note 78, at 675-79. See also sources cited *supra* note 1.

<sup>81</sup> See Neal Kumar Katyal, *Architecture as Crime Control*, 111 YALE L.J. 1039, 1056-57 (2002).

<sup>82</sup> Cf. Samuel Bray, *Power Rules*, 110 COLUMBIA L. REV. 1172, 1172 (2010) (discussing “power rules” that structure “underlying relations of power and vulnerability” among private individuals).

<sup>83</sup> See, e.g., ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 199 (1995) (observing that the doctrine has “received nearly universal condemnation from commentators”).

<sup>84</sup> See *id.* at 199-267.

<sup>85</sup> Calvin Massey, *Public Fora, Neutral Governments, and the Prism of Property*, 50 HASTINGS L.J. 309, 330-43 (1999).

<sup>86</sup> See POST, *supra* note 83, at 199 (characterizing the doctrine as “a serious obstacle ... to sensitive First Amendment analysis”) Massey, *supra* note 85, at 301-31; Zick, *supra* note 6, at 457 nn. 112, 115.

<sup>87</sup> See Marvin Ammori, *Another Worthy Tradition: How the Free Speech Curriculum Ignores Electronic Media and Distorts Free Speech Doctrine*, 70 MO. L. REV. 59, 86-92 (2005) [hereinafter Ammori, *Curriculum*]; Marc Jonathan Blitz, *Video Surveillance and the Constitution of Public Space: Fitting the Fourth Amendment to a World that Tracks Image and Identity*, 82 TEX. L. REV. 1349, 1370 (2004)

and generally rely on phone or cable wires or wireless signals. These spaces are generally subject to affirmative speech obligations through legislative, not judicial, decisions. Among others,<sup>88</sup> Chris Yoo<sup>89</sup> and Laurence Tribe<sup>90</sup> have argued that the Constitution forbids (and should forbid) the government from passing laws to ensure access to spaces (*i.e.*, the wires and airwaves) owned by media and communications companies. On the other side of this debate are scholars including C. Edwin Baker, Yochai Benkler, Jack Balkin, Lessig, and others. They argue that the First Amendment, as applied by judges, should encourage or permit government to make virtual spaces available to diverse speakers.<sup>91</sup> Balkin

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(nothing that Americans live “not only in homes, offices, or enclosed phone booths, but also in Internet chat rooms, web sites, and other electronic environments”); See Daniel J. Solove, *Identity Theft, Privacy, and the Architecture of Vulnerability*, 54 HASTINGS L.J. 1227, 1240-41 (2003) (“Our environment is ... shaped spatially .... [partly] by the design of information systems.”); *Ipsos OTX Study: People Spend More Than Half Their Day Consuming Media*, THE WRAP (Sept. 20, 2010, 6:54 PM) <http://www.thewrap.com/media/column-post/people-spend-more-12-day-consuming-media-study-finds-21005>.

<sup>88</sup> See, *e.g.*, William E. Lee, *Cable Modem Service and the First Amendment: Adventures in a “Doctrinal Wasteland,”* 16 HARV. J.L. & TECH. 125, 128, 154-55 (2002); Randolph J. May, *Net Neutrality Mandates: Neutering the First Amendment in the Digital Age*, 3 I/S: J.L. & POL’Y FOR INFO. SOC’Y 197, 202-10 (2007).

<sup>89</sup> See Christopher S. Yoo, *Free Speech and the Myth of the Internet as an Unintermediated Experience*, 78 GEO. WASH. L. REV. 697, 739-50 (2010); Christopher S. Yoo, *Architectural Censorship and the FCC*, 78 S. CAL. L. REV. 669, 713 (2005) [hereinafter Yoo, *Architectural*]; Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 Geo. L.J. 245 (2003) [hereinafter Yoo, *Rise*].

<sup>90</sup> See Tribe & Goldstein, *supra* note 19; Laurence H. Tribe, *Why The Federal Communications Commission Should Not Adopt A Broad View Of The “Primary Video” Carriage Obligation: A Reply To The Broadcast Organizations, National Cable & Telecommunications Association (“NCTA”) ex parte*, CS Dkt. No. 98-120, filed Nov. 24, 2003, <http://fjallfoss.fcc.gov/ecfs/document/view?id=6515291211>; Transcript of Oral Argument at 34-35, *United States v. Chesapeake & Potomac Telephone Co. of VA*, 116 S.Ct. 1036 (1996) (Nos. 94-1893, 94-1900); Brief for Petitioner Time Warner Entertainment Company, L.P. at 11-22, *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002) (Nos. 00-1222 et al.) (brief by Laurence Tribe) [hereinafter TWE-Fox Brief].

<sup>91</sup> Baker has devoted three books to analyzing how media architectures favoring multiple speakers, rather than a few powerful ones, promote substantive democratic and individual autonomy goals. See BAKER, *OWNERSHIP*, *supra* note 65, at 54-88; BAKER, *MARKETS*, *supra* note 65, at 123-29. Benkler, in an influential book and several articles, has argued that law can, and should, favor more decentralized and more non-commercial speech architectures. See, *e.g.*, BENKLER, *supra* note 65, at 176-212; Benkler, *supra* note 65, at 381-86. Lessig has discussed government discretion to adopt “architectures of freedom” or “architectures of control.” See LESSIG, *supra* note 1, at 24. In the 1990s, Owen Fiss argued that government should alter the design of media systems to address private censorship of ideas, generally imposed by television companies. See FISS, *supra* note 65, at 142-59; Owen Fiss, *The Censorship of Television*, 93 NW. U. L. REV. 1215 (1999). Mark Tushnet has set out a First Amendment “managerial model” that permits the legislature to increase the amount or diversity of speech. See Tushnet, *supra* note 65, at 2. See also

has even argued that our era's most important free speech decisions will come not from judges addressing censorship but from technologists and policy-makers addressing questions of architectural design.<sup>92</sup> Of course, many believe their arguments conflict with "core" First Amendment purposes and lack grounding in precedent. More importantly, these scholars have failed to articulate clear constitutional guidelines for, and limits on, government's discretion when it aims to increase access for speech spaces.

Constitutional law shapes architecture in two interrelated ways: through judicial decisions and through legislative decisions permitted by the judiciary. Judiciary decisions are generally supreme in constitutional law,<sup>93</sup> particularly for individual rights such as freedom of speech.<sup>94</sup>

Moreover, even assuming judicial supremacy,<sup>95</sup> legislative decisions reveal much about "constitutional" law. That is, legislative decisions about speech do not lie outside constitutional law; they are not merely "information policy," postal policy, or common carrier policy but are also constitutional law.

First, we should not overlook the importance of what *is* constitutional. What is *permissible* says as much about constitutional law as what is forbidden. Government's permissible power to enhance punishment for racially motivated threats counts as "constitutional law" no less than the government's inability to impose viewpoint-based distinctions on fighting words.<sup>96</sup> Decisions that uphold legislation can clarify "constitutional" law for the First Amendment as they can for the Commerce Clause.<sup>97</sup> All passable<sup>98</sup> judicial tests (by definition) must impose at least some mandatory requirements on government (or else government could not fail the tests) and some discretion on other choices (or else government could not

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TRIBE, *supra* note 2, at 214-16 (arguing that the Court will permit government to address allocational but not distributive imperfections in speech, with allocational referring to the "total quantum" of speech).

<sup>92</sup> See Balkin, *supra* note 65, at 942.

<sup>93</sup> See, e.g., *Marbury v. Madison*, 5 U.S. (Cranch) 137, 177 (1803); Robert Post & Reva B. Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. REV. 373, 375 (2007) (noting "traditional scholarship has tended to confuse the Constitution with judicial decisionmaking").

<sup>94</sup> See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST* 101-31 (1980); Note, *Deference to Legislative Fact Determinations in First Amendment Cases After Turner Broadcasting*, 111 HARV. L. REV. 2312, 2317 (1998) ("The most fundamental norm of First Amendment jurisprudence is the primacy accorded to the judicial branch in the assessment of free expression claims . . .").

<sup>95</sup> Cf. MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 1 (1999).

<sup>96</sup> Compare *Virginia v. Black*, 538 U.S. 343, 358-61 (2003) with *R.A.V. v. St. Paul*, 505 U.S. 377, 391-94 (1992).

<sup>97</sup> See *Gonzales v. Raich*, 545 U.S. 1, 9 (2005).

<sup>98</sup> Government laws pass strict scrutiny more often than assumed. See Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 805-813 (2006).

pass them).<sup>99</sup> Those requirements and discretion both constitute aspects of constitutional law. While some judicial decisions can *require* the availability of some spaces for speech (parks, streets), decisions often permit spaces be made available, subject to some constitutional constraints, such as content-neutrality.

Second, legislating takes place in the shadow of constitutional law. Legislative decisions often reflect known constitutional constraints articulated by the judiciary.<sup>100</sup> Legislatures have guidance based on judicial decisions, as litigants often bring First Amendment challenges to “information policy” and common carrier policies.<sup>101</sup> The Supreme Court decides some of these cases, but other federal appellate courts also provide important guidance on these constitutional issues.<sup>102</sup> Other times, the long-time acceptability of certain rules may reflect a “constitutional practice” suggesting constitutionality.<sup>103</sup>

Finally, scholars have argued that legislatures play an important role in entrenching, by supplying remedies unavailable to courts, and in creating constitutional norms as “norm” entrepreneurs<sup>104</sup> As a result, permissible legislative actions—including those expanding the availability of speech spaces—may themselves reflect constitutional norms.

## **B. Some Organizing Distinctions for Interpretive Analysis**

I organize this section by architectural principle rather than what the negative-liberty model considers ill-fitting, *admittedly* incoherent, doctrinal categories. I use functional considerations, which help reveal some commonalities and distinctions.

### **1. Lumping**

For commonalities, I lump together laws for several spaces often believed to have very different doctrine—private and public, physical and virtual, spaces using differing technologies, and some spaces governed by different doctrinal categories.

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<sup>99</sup> See *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 799-800, 806 (1985) (noting the requirement of viewpoint-neutrality even nonpublic forums).

<sup>100</sup> Cf. Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 869 (1999).

<sup>101</sup> See Ammori, *Curriculum*, *supra* note 87, at 92–122; Marvin Ammori, *Beyond Content Neutrality: Understanding Content-Based Promotion of Democratic Speech*, 61 FED. COMM. L.J. 273, 288-291 (2009) [hereinafter Ammori, *Democratic Content*].

<sup>102</sup> This is particularly true of the D.C. Circuit, which hears many agency appeals, and on which Justices Scalia, Ginsburg, Thomas, and Chief Justice Roberts all served.

<sup>103</sup> See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 201–04 (2003).

<sup>104</sup> See also *infra* notes 287-388 and accompanying text (discussing rights under-inclusion and remedies).

First, I lump spaces on privately owned and publicly owned property. Public or private, the same principles often apply.<sup>105</sup> I lump designated public forums (publicly owned) and access rules to shopping malls (privately owned); I also lump traditional public forums (publicly owned) and access to equivalent forums in privately owned company towns (privately owned). Supreme Court Justices have likened access rules to private communications infrastructure to limited public forum doctrine.<sup>106</sup>

Second, I lump physical and virtual spaces. This lumping reveals overlooked commonalities for postal carriage of newspapers (virtual, public) and cable carriage of broadcast signals (virtual, private). Formally, different doctrines generally lead to the same outcome, often for the same reasons.

Third, to the delight, but surprise, of most scholars, we need not divide up doctrine artificially based on “*technology*” or “*medium*.” Across spaces, both physical and virtual, from central parks to “*cyberspaces*,” doctrine is far more consistent than usually assumed. While cases may come out differently, we can explain them with lawyers’ usual rationales for distinguishing or reconciling cases—a case may have misapplied principles or properly applied them to different facts.

Finally, and suggested above, I lump together issues from different doctrinal areas, such as limited public forum, subsidized speech, or telecom access rules. Others have noted the commonalities among some of these doctrines.<sup>107</sup> These doctrines have also prompted deep scholarly and judicial confusion, so they do not even serve to clarify analysis.<sup>108</sup>

## 2. Splitting

To reflect important distinctions, I split constitutionality and optimality, as well as speakers and spaces.

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<sup>105</sup> Cf. Note, *Public Space, Private Deed: The State Action Doctrine and Freedom of Speech on Private Property*, 123 HARV. L. REV. 1303, 1303-04 (2010)

<sup>106</sup> See *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 791-92 (1996) (Kennedy, J., concurring in part and dissenting in part).

<sup>107</sup> See, e.g., Elena Kagan, *The Changing Faces of First Amendment Neutrality: R.A.V. v. St. Paul, Rust v. Sullivan, and the Problem of Content-Based Underinclusion*, 1992 SUP. CT. REV. 29, 67, 72-73 (discussing fighting words and subsidized speech); Ammori, *Democratic Content*, *supra* note 101, at 286-302 (discussing other doctrines). Some have tried to justify broadcast access rules based on these doctrines. See, e.g., Charles W. Logan, Jr., *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 CAL. L. REV. 1687, 1741-42 (1997).

<sup>108</sup> See Frederick Schauer, *Too Hard: Unconstitutional Conditions and the Chimera of Constitutional Consistency*, 72 DENV. U. L. REV. 989, 990 (1995) (arguing that unconstitutional-conditions doctrine is incoherent and any solution to the incoherence is “unlikely to exist”); Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 152 (1996) (noting the “perplexing territory” full of “difficult constitutional questions”).

First, whether a law is constitutional is distinct from whether the law reflects good policy. Even regarding speech matters, government often has the choice among several policy outcomes, all of which are constitutional, even if only one is optimal (depending on your measure). Non-judicial branches sometimes *can* adopt particular “affirmative” rights of access, but need not do so, and have a range of policy options to shape those access rules they choose to adopt.<sup>109</sup> A range of access laws—which provide access for speakers to physical and virtual spaces—might be permissible, even if not required. So, “imperfect,” and even “bad,” laws are not always unconstitutional.

Second, judges implicitly distinguish between speakers and spaces. When governments regulate privately owned spaces, the owners object that government is censoring them as “speaker,” compelling the property owner to carry speech with which she disagrees and abridging her “editorial right” to choose the speech carried on her property.<sup>110</sup> Proponents of the regulation argue that government is merely making spaces available for many speakers.

Rather than proposing a test to “split” spaces and speakers, we need only recognize that the need to make this distinction does not undermine the argument that doctrine should be concerned with spaces. Courts (and agencies) often already manage to address this question, looking to contextual factors, including the owner’s actions, regulatory history, and our collective norms and understandings about spaces and speakers. Generally the legislature can treat the property as a space where a space has been opened to many other speakers voluntarily and where few would assume that those speakers reflects the owner’s views.<sup>111</sup> For example, the FCC concluded that cable and phone companies acted more as conduits, or spaces, than as speakers when they offer access to the Internet.<sup>112</sup> Scholars like Chris Yoo and Laurence Tribe suggest these companies are, instead, speakers.<sup>113</sup>

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<sup>109</sup> See, e.g., Schauer, *Hohfeld’s*, *supra* note 39, at 932.

<sup>110</sup> See, e.g., *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 86-88 (1980).

<sup>111</sup> See *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 85-89 (1980) (considering several factors, including that the shopping mall was commercial, open to others, and that few would attribute customers’ views to the mall owner); Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1252 (1995) (discussing the importance of social context to speech analysis). Cf. Redish & Kaludis, *supra* note 39, at 1127-28 (discussing this issue as a “gatekeeper dichotomy”). These answers may change. See Burt Neuborne, *Speech, Technology, and the Emergence of a Tricameral Media: You Can’t Tell the Players Without a Scorecard*, 17 HASTINGS COMM. & ENT. L.J. 17, 21, 27 & nn. 16-19 (1994) (discussing printers).

<sup>112</sup> See FCC, *Open Internet*, 2010 WL 5281676, at 42. These companies may act as speakers when they take out advertisements or establish websites. *Id.* Websites are better analogized to parcels, Internet access to postal carriage. Cf. *Pacific Gas & Electric v. Public Utilities Commission*, 475 U.S. 1, 9 (1986).

<sup>113</sup> See FCC, *Open Internet*, *supra* note 14, at \*49, 79-80 (rejecting arguments in Tribe & Goldstein, *supra* note 19, at 3-4).

## C. Five Architectural Principles

This section traces five principles shaping our access to spaces for speech.

### 1. Sufficient, Judicially Required Spaces

Judicially required spaces are “exceptions” or “outliers,” but there is a reason for these exceptions. They support both autonomy and minimal spaces for discourse.

#### a) Spaces for Autonomy

To ensure spaces for individual autonomy in a democracy, the judiciary has carved out a space for “special respect,”<sup>114</sup> namely the family home.<sup>115</sup>

Standard First Amendment rules do not apply within homes. Government has less power to determine content here, while it can suppress unwanted outsider speech more easily.<sup>116</sup>

Some content is protected in the home and nowhere else. In *Stanley v. Georgia*,<sup>117</sup> the Court held that a state cannot prohibit the possession of obscene material found in someone’s home<sup>118</sup> – though “obscene” speech receives “no” protection in *other* spaces.<sup>119</sup> The Court held that a state “has no business telling a man, sitting alone in his house, what books he may read or what films he may watch.”<sup>120</sup>

While government can often regulate speech by content-neutral means, it often cannot regulate speech this way when projected from private homes.<sup>121</sup> In *City of Ladue v. Gilleo*, the Court struck down a law regulating lawn signs; the

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<sup>114</sup> *City of Ladue v. Gilleo*, 512 U.S. 43, 57-58 (1994). Cf. John Fee, *Eminent Domain and the Sanctity of Home*, 81 NOTRE DAME L. REV. 783, 786-88 (2006); Stephanie M. Stern, *The Inviolable Home: Housing Exceptionalism in the Fourth Amendment*, 95 CORNELL L. REV. 905, 913 (2010).

<sup>115</sup> The rights of homeless people have been subject to debate. See, e.g., David H. Steinberg, *Constructing Homes for the Homeless? Searching for a Fourth Amendment Standard*, 41 DUKE L.J. 1508, 1536-40 (1992).

<sup>116</sup> Cf. Fee, *supra* note 39, at 1109 (identifying a zone of protection where speech rights “cannot be reduced, whether or not government restricts all speech equally”); see also *id.* at 1164-65.

<sup>117</sup> 394 U.S. 557 (1969).

<sup>118</sup> *Id.* at 568.

<sup>119</sup> See *Roth v. United States*, 354 U.S. 476 (1957).

<sup>120</sup> *Stanley*, 394 U.S. at 565-66. See also *Osborne v. Ohio*, 495 U.S. 103 (1990) (upholding prosecution for actual (not virtual) child pornography). See also Marc Jonathan Blitz, *Stanley in Cyberspace: Why the Privacy Protection of the First Amendment Should Be More Like that of the Fourth*, 62 HASTINGS L.J. 357, 357, 362 (2010).

<sup>121</sup> *City of Ladue v. Gilleo*, 512 U.S. 43, 58 (1994).

concurrency noted that the Court did not even bother to apply a traditional doctrinal test.<sup>122</sup>

At the same time, government has more discretion to silence outsiders hoping to speak at the home. Explicitly based on the right to quiet enjoyment and reflection at home, the Court has upheld government laws limiting offensive mailings,<sup>123</sup> radio broadcasts,<sup>124</sup> picketing in front of the home,<sup>125</sup> and sound trucks.<sup>126</sup> Government can even empower citizens to turn away door-to-door advocates by posting a notice in their windows.<sup>127</sup> Meanwhile, the Court has repeatedly emphasized, regarding other, more public, communicative spaces such as traditional public forums, that the government cannot shield listeners from unpleasant speech, ranging from flag burning in public to jackets decorated with F-bombs at courthouses.<sup>128</sup>

These “exceptions” for the home point in the same direction: this space receives special protection, insulated somewhat from both government meddling and public speech. As I will contend later, this protected space appears to reflect democracy’s necessary respect of individual autonomy. As Robert Post and others have argued, for individuals to participate in a democracy without being subsumed by it, the home can serve as a space for reflection and analysis, buffering the self from the “public sphere” or government.<sup>129</sup> These “exceptional” areas in doctrine are not exceptional in practice, especially in considering the amount of time we spend in our homes.

#### b) Spaces for Discourse

The second judicially required space consists primarily of “traditional public forums” and their equivalents on private property. Like the home, the doctrines making these spaces available are “exceptional.” These include public

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<sup>122</sup> *Id.* at 59–60 (O’Connor, J., concurring).

<sup>123</sup> *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970).

<sup>124</sup> *FCC v. Pacifica Foundation*, 438 U.S. 726, 748–749 (1978).

<sup>125</sup> *Frisby v. Schultz*, 487 U.S. 474, 484 (1988).

<sup>126</sup> *Kovacs v. Cooper*, 336 U.S. 77, 86–87 (1949).

<sup>127</sup> *Martin v. City of Struthers*, 319 U.S. 141, 147–48 (1943).

<sup>128</sup> *See, e.g., Texas v. Johnson*, 491 U.S. 397, 414 (1989); *Cohen v. California*, 403 U.S. 15, 21–22 (1971).

<sup>129</sup> *See POST, supra* note 83, at 1–5; *Post, supra* note 36, at 1115–23 (1993). *See also* Michael Adler, *Cyberspace, General Searches, and Digital Contraband: The Fourth Amendment and the Net-Wide Search*, 105 *YALE L. J.* 1093, 1110 (1996); Note, *The Impermeable Life: Unsolicited Communications in the Marketplace of Ideas*, 118 *HARV. L. REV.* 1314, 1321 (2005) (“The Supreme Court has tied the right to be left alone to geographical space. The doctrine envisions private space, particularly the home, as a zone into which a person can withdraw relatively undisturbed by unsolicited communications.”). On the necessity of ensuring autonomy in a democracy, *see also* Joshua Cohen, *Deliberation and Democratic Legitimacy*, in *PHILOSOPHY, POLITICS, DEMOCRACY: SELECTED ESSAYS* 16, 25–28 (2009); *SWIFT, supra* note \_\_, at 191–94.

parks, streets, and squares. These “exceptional” physical spaces are significant both in terms of the population using them and the spatial area they cover.<sup>130</sup>

Unlike most other spaces, traditional public forums generally cannot be closed off entirely to public speech. In *Hague v. Committee for Industrial Organization*,<sup>131</sup> and *Schneider v. State of New Jersey*,<sup>132</sup> both decided in 1939, the Court struck down an ordinance forbidding pamphleteering “on any street or public place.”<sup>133</sup> Similarly reflecting a concern with ample speech spaces, any restriction on these forums that is not a “ban” must, among other things, leave “open ample alternative channels for communication.”<sup>134</sup> The ample-channels requirement, which is not found in other intermediate speech tests,<sup>135</sup> is concerned not with censorship but with the architectural concern of ensuring sufficient speech spaces.

The traditional public forum doctrine suggests that some minimal spaces, ample for *some* speech purpose, must be available.

Tellingly, this principle is not limited to publicly owned property. In another “outlier” reflecting the same principle, the Court required apparently identical minimal access even for privately owned property when such spaces would not have been otherwise available. In *Marsh v. Alabama*,<sup>136</sup> decided in 1946, the Supreme Court concluded that streets in a company town must be treated like traditional public forums.<sup>137</sup> *Marsh* is an outlier, but in the same way as public property, demonstrating a broader point about speech spaces: in any town, private or public, the streets and parks (but no more) *must* be available to speakers. They must also be available, of course, to those who leaflet, advocate from door to door, or deliver newspapers door to door.

I suggested that the judiciary requires such spaces to ensure sufficient speech spaces for all. Sufficient for what? Answering this question is not easy, but certainly streets and parks are not enough space for all to contribute equally in our democracy, or perhaps even for anyone to contribute effectively at all when compared to the importance of television and Internet in our society. Rather, it seems we must have space sufficient, at least, to contribute to deciding whether

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<sup>130</sup> All public streets, including residential ones, are traditional public forums. *Frisby*, 487 U.S. at 481.

<sup>131</sup> 307 U.S. 496 (1939).

<sup>132</sup> 308 U.S. 147 (1939) (striking down four state ordinances).

<sup>133</sup> *Id.* at 501, 516.

<sup>134</sup> *Perry Educ. Ass'n*, 460 U.S. at 45, 56 (emphasis added).

<sup>135</sup> See, e.g., *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (enunciating constitutional test for content-neutral restrictions on symbolic speech); *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 564 (1980) (enunciating constitutional test for commercial speech).

<sup>136</sup> 326 U.S. 501 (1946).

<sup>137</sup> *Id.* at 506.

opening additional spaces is necessary for effective debate. That is, while streets and parks may not be enough to contribute to the health care debate, they may be enough for debate that opens additional spaces.

While the courts generally limit access to spaces based on which forums have been “traditionally” open, requiring merely minimal spaces serves two functional purposes. First, the court is ensuring a political process to determine whether additional spaces are necessary for discourse. As we will see, the government has often opened additional spaces for discourse. The courts are making the question of opening up more spaces a political question, with minimal open channels to address the question. Second, beyond entrusting the question of additional spaces to democratic decision-making, the court can also piggy-back off of government’s institutional competence in setting required spaces in a community. Courts often lack the competence to determine which spaces are necessary for speech—in Cambridge, Ann Arbor, or Peoria. But the judiciary can make this determination indirectly. But content-neutral requirements in opening additional spaces will play an essentially affirmative (not negative) role.<sup>138</sup> As we will see in the next subsection, whenever government makes available spaces that are *not* mandatory, it must do so in an even-handed way, without discriminating against particular speakers or viewpoints. If government believes that *some* speakers need access to additional spaces, then all similarly-situated speakers receive the same benefit, increasing the minimal spaces effectively available (by law) to all speakers. If government opens space to Republicans, the content-neutral requirement creates an *affirmative* right for Democrats to access that same space, increasing the minimal spaces available through an effectively affirmative judicial requirement. So courts need not speculate on the spaces necessary for individuals to meaningfully engage in discourse; it can free ride on legislative decisions through the content-neutral doctrine for designated spaces. In the meantime, it need only require minimal spaces for such discourse.

### c) Symbolic Democratic Spaces

The Constitution’s “Speech or Debate” clause ensures mandatory, but quite minimal, access for *some* speakers to *some* spaces, as required for our democracy to function. The clause provides that, “for any speech or debate in either House, [Senators and Representatives] shall not be questioned in any other place.”<sup>139</sup> In terms of sufficient spaces for speech, congressional spaces are as necessary for democracy as mandatory protection for the homes of Americans.

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<sup>138</sup> See Fee, *supra* note 39, at 1159–69.

<sup>139</sup> U.S. Const. Art. I, § 6.

Similarly, the traditional public forum doctrine extends to the spaces outside federal and state capitol buildings<sup>140</sup> and courthouses.<sup>141</sup> In the words of Judge Skelley Wright, “There is an unmistakable symbolic significance in demonstrating close to the White House or on the Capitol grounds which, while not easily quantifiable, is of undoubted importance in the constitutional balance.”<sup>142</sup> Quite simply, government officials might have particularly strong incentives to silence speech in such spaces, to avoid dissent, while the public benefits from the ability to address government officials directly in spaces where the officials implement power.

## 2. Additional, Designated or Discretionary Spaces

The second principle evident in precedent even more directly challenges the negative-liberty model’s assumptions.

Building on these judicially required spaces, the Supreme Court provides considerable, but circumscribed, deference to governmental attempts to open *additional* spaces—public and private, physical and virtual. Further, governments can make additional spaces available for particular classes of speakers, to further particular speech goals, such as to encourage educational or political speech. The courts circumscribe this deference: government must not punish or prefer messages through opening these spaces.<sup>143</sup>

Deference for additional spaces promotes “more” speech in two ways. Government can provide access to more speech spaces, which, from a speaker’s point of view, are just as important whether mandated by the judiciary or government. If a user has unfettered access to Internet forums, the user likely does not care if a statute or court decision ensured that access. Second, the question of society’s communicative architecture itself becomes an additional legitimate subject of democratic debate, increasing the range of topics for public debate about legislative issues.<sup>144</sup>

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<sup>140</sup> See, e.g., *Pouillon v. City of Owosso*, 206 F.3d 711, 717 (6th Cir. 2000) (and cases cited therein).

<sup>141</sup> *United States v. Grace*, 461 U.S. 171, 179-80 (1983) (treating the sidewalks outside the Supreme Court as public forums, though not the steps and interior); *Cox v. Louisiana*, 379 U.S. 536, 551 (1965).

<sup>142</sup> *Women Strike for Peace v. Morton*, 472 F.2d 1273, 1287 (D.C.Cir.1972) (Wright, J., concurring).

<sup>143</sup> This observation comports with the observations of Elena Kagan, Mark Tushnet, and others that the judiciary often employs lower, “non-standard” scrutiny to government efforts to increase the amount of speech available to individuals—as evidenced by the doctrine of speech exceptions, speech subsidies, copyright, and other areas of doctrine. See Note, *Speech Exceptions*, 118 HARV. L. REV. 1709, 1710-11 (2005); Kagan, *supra* note 25, at 472; Tushnet, *supra* note 65, at 2; Tushnet, *supra* note 53, at 54-68.

<sup>144</sup> Scholars often argue that constitutional decisions “short-circuit” public debate and the political process. See, e.g., Kermit Roosevelt, *Shaky Basis for a Constitutional “Right,”* WASH. POST, Jan. 22, 2003, at A15 (“By declaring an inviolable fundamental right to abortion, [*Roe v. Wade*, 410 U.S.

### a) Physical Spaces: Publicly and Privately Owned

*Publicly owned spaces.* Government can affirmatively open the physical spaces it owns through, among other formal doctrines, the designated public forum and limited public forum. Government can, by choice, *designate* public spaces to speech.<sup>145</sup> Government need not designate them. While government has the discretion to open these spaces for speech, the court limits this discretion; government must treat these spaces, once open, as it treats traditional public forums, where content-based restrictions are subject to strict scrutiny and content-neutral to intermediate scrutiny.<sup>146</sup> Governments have designated municipal theaters, school board meetings, or other public property.<sup>147</sup> Analogously, if government opens newspaper dispensers on public streets to some papers, it must make them available to other papers, regardless of content.<sup>148</sup>

Similarly,<sup>149</sup> *limited forum* doctrine enables government to designate a forum not for *all*, but for “certain speakers, or for the discussion of certain subjects.”<sup>150</sup> A limited public forum can be either a “place” or a (virtual) “channel of communication”<sup>151</sup>; it can even be “a metaphysical” rather than a “spatial or geographic” space, such as a fund of money.<sup>152</sup> Limited public forums include, among others, university facilities for student groups<sup>153</sup> or open areas of school campuses.<sup>154</sup> The applicable doctrinal test seems not to require subject-matter (or “content”) neutrality in selecting speakers,<sup>155</sup> but does require viewpoint-

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113 (1973)] short-circuited the democratic deliberation that is the most reliable method of deciding questions of competing values.”).

<sup>145</sup> *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45–46 (1983); see also Note, *Strict Scrutiny in the Middle Forum*, 122 HARV. L. REV. 2140, 2143–44 (2009) [hereinafter Note, *Middle Forum*].

<sup>146</sup> See *Christian Legal Society v. Martinez*, 130 S.Ct. 2971, 2984 n.11 (2010).

<sup>147</sup> See *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975) (municipal auditorium and city-leased theater); *Madison Joint School District v. Wisconsin Employment Relations Comm’n*, 429 U.S. 167, 174, n. 6 (1976) (school board meetings).

<sup>148</sup> Cf. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417–419 (1993).

<sup>149</sup> This doctrine, however, is confusing. See Marc Rohr, *moThe Ongoing Mystery of the Limited Public Forum*, 33 NOVA L. REV. 299, 300 n.3 (2009); Note, *Middle Forum*, *supra* note 145, at 2154.

<sup>150</sup> *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985).

<sup>151</sup> *Id.*

<sup>152</sup> *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995).

<sup>153</sup> See *Widmar v Vincent*, 454 U.S. 263 (1981).

<sup>154</sup> *Justice for All v. Faulkner*, 410 F.3d 760, 769–70 (5th Cir. 2005); Rohr, *supra* note 149, at 38.

<sup>155</sup> The relationship between speaker-discrimination and content-discrimination is uncertain. Compare *Citizens United v. FEC*, 130 S.Ct. 876, 899 (2010) *with id.* at 945 (Stevens, J., dissenting). See also Fee, *supra* note 39, at 1129–30.

neutrality.<sup>156</sup> As a result, government can grant publicly owned spaces to particular speakers; the most well-known cases designate educational spaces particularly to student groups. Despite the First Amendment's core principle of value-neutrality, these legislative and administrative decisions clearly reflect particular values.<sup>157</sup>

*Privately owned spaces.* Just as traditional public forums include the equivalent minimal *private* spaces (the lesson of *Marsh v. Alabama*), government can also designate private property under the same terms, so long as the space is sufficiently open to the public.<sup>158</sup> For example, privately owned shopping malls are not publicly owned, not traditional public forums, and not otherwise required to be open to all by judicial fiat alone.<sup>159</sup> But in 1980, in *Pruneyard Shopping Center v. Robins*,<sup>160</sup> the Supreme Court unanimously held that states *may* adopt legislation that opens up private shopping malls for speech, rejecting the mall's speech claim.<sup>161</sup>

#### b) Virtual spaces: Publicly and Privately Owned

The courts' treatment of virtual spaces is identical and revealing, particularly for privately-owned spaces.

*Government-owned.* Throughout most of its history, the U.S. postal network was the main space for mediated speech generally, and for the speech of newspapers specifically.<sup>162</sup> Just as newspapers are available today through cyberspaces (from nytimes.com to the iPad), initially newspapers were available primarily through postal "spaces." The postal network has long been among our most important mediums, and was the most important medium at our nation's Founding.<sup>163</sup> Constitutionally discretionary legislative rules, regarding access to

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<sup>156</sup> Oddly, reasonableness and viewpoint-neutrality apply to any forum, even a non-public forum, leading some to question the logic of this test. Rohr, *supra* note 149, at 22.

<sup>157</sup> See Ammori, *Democratic Content*, *supra* note 101, at 286-302.

<sup>158</sup> See, e.g., *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 87 (1980); see also *supra* Part II.B.2.

<sup>159</sup> See *Hudgens v. National Labor Relations Board*, 424 U.S. 507, 520-21 (1976).

<sup>160</sup> 447 U.S. 74 (1980).

<sup>161</sup> See *id.* at 79-80, 85-88 (treating the California constitution as a state statute); see also *State v. Schmid*, 84 N.J. 535, 567-69 (N.J. 1980), *appeal dismissed sub nom.* *Princeton University v. Schmid*, 455 U.S. 100 (1982) (holding that state law required access for speakers on private college campuses).

<sup>162</sup> See, e.g., RICHARD B. KIELBOWICZ, *NEWS IN THE MAIL: THE PRESS, POST OFFICE, AND PUBLIC INFORMATION, 1700-1860S* (1989); STARR, *supra* note 13; see also Richard B. Kielbowicz & Linda Lawson, *Reduced-Rate Postage For Nonprofit Organizations: A Policy History, Critique, and Proposal*, 11 HARV. J. L. & PUB. POL'Y 347, 358-60 (1988).

<sup>163</sup> See KIELBOWICZ, *supra* note 162, at 1-146.

postal spaces, protected and promoted newspapers' speech even more than judicial doctrine for most of our history.<sup>164</sup>

Since before the Constitution and well into the 20th Century, the "post office and press working together," were "intertwined" as one "major communication system."<sup>165</sup> At our Founding, and until the invention of the telegraph, the postal network was the "only widespread and regular means" for gathering and distributing news.<sup>166</sup> For decades, the postal network's primary function was disseminating newspapers, rather than letters; government taxed letters heavily to subsidize newspapers.<sup>167</sup> Many early publishers were postmasters,<sup>168</sup> while postmasters often also served as unofficial subscription agents for newspapers, encouraging subscription to local papers, based both on custom and postal laws.<sup>169</sup> The names of newspapers still reflect this relationship: the "evening post" or the "daily mail."<sup>170</sup> In the 1980s, Justice Brennan called the postal service "a vital national medium of expression."<sup>171</sup>

Because of the importance of the postal service to news, Congress retained the power of rate-making, and retained at least some rule-making authority until 1970.<sup>172</sup> Congress used the mailing system deliberately to promote publications discussing news and affairs.<sup>173</sup> The press mailing-privileges "raised perennial questions for policymakers" on speech policy, such as "[s]hould government be involved . . . in fostering the diffusion of public information."<sup>174</sup> Genres and publications died and lived based on postal policy.<sup>175</sup>

Much like a limited public forum, government could single out newspapers as a favored class of speakers to these spaces, though without discrimination among papers.<sup>176</sup> Indeed, Congress had to designate the forum in the first place;

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<sup>164</sup> See STARR, *supra* note 13, at 266-68; Baker, Turner, *supra* note 65, at 95-99; Anuj C. Desai, *The Transformation of Statutes into Constitutional Law: How Early Post Office Policy Shaped Modern First Amendment Doctrine*, 58 HASTINGS L.J. 671, *passim* (2007).

<sup>165</sup> KIELBOWICZ, *supra* note 162, at xi, 1.

<sup>166</sup> *Id.* at 1.

<sup>167</sup> See KIELBOWICZ, *supra* note 162, at 3; Kelly B. Olds, *The Challenge to the U.S. Postal Monopoly, 1839-1851*, 15 CATO J. 1, 5-7 (Spring-Summer 1995).

<sup>168</sup> See STARR, *supra* note 13, at 55-58; KIELBOWICZ, *supra* note 162, at 13.

<sup>169</sup> See KIELBOWICZ, *supra* note 162, at 43, 103.

<sup>170</sup> See *id.* at 16.

<sup>171</sup> *U.S. Postal Serv. v. Council of Greenburgh Civic Assn's*, 453 U.S. 114, 138 (1981) (Brennan, J., concurring)

<sup>172</sup> See KIELBOWICZ, *supra* note 162, at 2.

<sup>173</sup> See *id.* at 1, 3.

<sup>174</sup> *Id.* at 2

<sup>175</sup> See *id.* at 8 n.4, 129.

<sup>176</sup> See, e.g., *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 153-9 (1946) (holding that government could not make value judgments about the literature included into second class mail); *Lamont v. Postmaster Gen.*, 381 U.S. 301, 305 (1965) (holding government could not require citizens to opt

the Constitution does not require government to make postal spaces available,<sup>177</sup> and the Court has determined postal spaces are nonpublic forums unless designated otherwise.<sup>178</sup> Moreover, Congress's requirement of nondiscrimination specifically reversed pre-Constitution practice, which consisted of postmasters denying mail-access to competing papers, something that Benjamin Franklin both experienced and then (when postmaster) exploited.<sup>179</sup> Like cable operators of today, postmasters could determine which speakers to carry or drop. After Constitutional ratification, the first Congress fired the Postmaster, who had previously engaged in discrimination, and passed the first major Post Office act, removing postmasters' discretion over admitting or denying newspapers.<sup>180</sup>

To this day, political magazines still rely on low postal rates, prompting controversy over proposed rate hikes,<sup>181</sup> and the postal network's largest corporate client is Netflix, which distributes speech (films and shows) through both the Internet and the postal service.<sup>182</sup> Needing access to both speech spaces, its government affairs staff is active on two legal issues: network neutrality (for access to Internet) and postal rates.<sup>183</sup> Neither space is a traditional public forum.

*Privately-owned.* Government has effectively designated several virtual spaces on privately owned infrastructure, just as it has, and can, designate private shopping malls and public postal spaces.

These include the telegraph-news network, cable systems, phone systems, and access to the Internet. While speech scholars often use the term "access rules" to refer to rules opening up these spaces, the most onerous and pervasive access rules are "common carrier" rules, which are the equivalent of designating access for *all* speakers, for a nondiscriminatory fee.<sup>184</sup> By law, a phone company is a

into receiving mail from political sources). Earlier decisions were less enlightened. *See* RABBAN, *supra* note 25, at 27-32. *See also* KIELBOWICZ, *supra* note 162, at 121-29, 133-34; STARR, *supra* note 13, at 137, 161. Magazines also received privileges in the late 1800s, as did some nonprofits. STARR, *supra* note 13, at 261; Kielbowicz & Lawson, *supra* note 162, at 348, 352, 372-73.

<sup>177</sup> *See* U.S. Const. Art. I, § 8, cl. 7 (empowering Congress "[t]o establish Post Offices and post Roads").

<sup>178</sup> *See* U.S. Postal Serv. v. Council of Greenburgh Civic Assn's, 453 U.S. 114, 128-30 (1981).

<sup>179</sup> *See* KIELBOWICZ, *supra* note 162, at 16, 19.

<sup>180</sup> *See id.* at 23-24, 32. There were some abuses, nonetheless, mainly by Federalists. *See id.* at 40-42.

<sup>181</sup> *See, e.g.,* Xeni Jardin, *US Postal Mail Rate Hikes Screw Micro-Publishers: Thanks, Time Warner!*, BOINGBOING (May 18, 2008 11:07 AM), <http://www.boingboing.net/2008/05/18/us-postal-mail-rate.html>.

<sup>182</sup> *Netflix is the Big Loser in Postal Service Changes*, MSNBC.COM (Mar. 30, 2010, 1:04:10 PM), [http://www.msnbc.msn.com/id/36100708/ns/business-the\\_big\\_money/](http://www.msnbc.msn.com/id/36100708/ns/business-the_big_money/).

<sup>183</sup> Interview with Michael Drobac, Netflix Director of Government Relations, in Las Vegas, Nev. (Jan. 11, 2011).

<sup>184</sup> Common carrier rules require a company to serve all comers on terms and prices that do not discriminate among similarly situated users. *See* Nat'l Ass'n of Regulatory. Util. Comm'rs v. FCC, 525 F.2d 630, 641-42 (D.C. Cir. 1976); Thomas B. Nachbar, *The Public Network*, 17 COMM'LAW CONSP'CTUS 67, 71-79 (2008).

common carrier, accepting all callers for a fee. A newspaper is not, and need not accept a speaker's money to carry her speech.

*\*The Telegraph-Newspaper Network:* The government imposed common carrier rules on the telegraph network, despite any assertions that it was interfering with private speech or private speakers. The government's initial lack of telegraph regulation, however, resulted in "an unprecedented private monopoly in the national distribution of news" that lasted decades.<sup>185</sup>

The now forgotten telegraph was "the first national medium of mass communication" after the Post Office.<sup>186</sup> Samuel Morse invented the telegraph in 1832, and, by 1844, presidential candidate Henry Clay expressed concern that private owners of the telegraph could use it to "monopolize intelligence."<sup>187</sup> But the telegraph was left to the private sector without any access rules.<sup>188</sup> This private telegraph industry relied on, and overlapped with, the newspaper industry; telegraph-use was so expensive that customers were limited to press, not individuals.<sup>189</sup> Indeed, local reporters were often local telegraph operators.<sup>190</sup>

A bilateral monopoly developed in news and distribution. The telegraph industry moved from 50 companies in 1851 to only one by 1866—Western Union—partly through mergers.<sup>191</sup> For news, the Associated Press ("AP") became a monopoly news service. It received national news through a "network of agents around the country who rewrote items from local [partner] papers" and sent them, by telegraph, to other papers.<sup>192</sup> The AP had exclusive deals with Western Union, so it could deny rival news services and rival papers access to telegraph communications with, for example, Europe, to collect international news.<sup>193</sup> The AP also had exclusive deals with *newspapers*, so it could lock out other news services and other telegraph companies.<sup>194</sup>

This bilateral monopoly was an architectural result that many would deem undesirable for a democracy. Many believe it had the power deliberately to swing the contested 1876 election for Rutherford B. Hayes, an outcome that ended Reconstruction.<sup>195</sup> But as discussed earlier, according to the negative-liberty

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<sup>185</sup> See STARR, *supra* note 13, at 154.

<sup>186</sup> See *id.* at 178.

<sup>187</sup> See *id.* at 163.

<sup>188</sup> See *id.* at 163-65 (asserting mainly for fiscal reasons).

<sup>189</sup> See *id.* at 177.

<sup>190</sup> See *id.* at 185 (discussing the Associated Press and Western Union).

<sup>191</sup> See *id.* at 166, 173.

<sup>192</sup> See *id.* at 175.

<sup>193</sup> See *id.* at 174. I refer to predecessor organizations, including New York Associated Press, simply as AP.

<sup>194</sup> See *id.* at 185. There was no federal antitrust law; the Sherman Antitrust Act passed in 1890, decades later.

<sup>195</sup> See, e.g., TIM WU, *THE MASTER SWITCH: THE RISE AND FALL OF INFORMATION EMPIRES* 22-25 (2010).

model, the First Amendment should place enormous constitutional hurdles to breaking open this news monopoly through telegraph access rules; government should not interfere with negative liberty, make value judgments, or “redistribute” speech power.

Eventually, however, government did impose access regulation on the telegraph system. In 1910, Congress amended the Interstate Commerce Act to define telegraph (and telephone) carriers as common carriers, which required them to provide access beyond the AP without discrimination or exclusivity, much like the (publicly owned) postal network.<sup>196</sup>

*\*Access to Cable Systems:*<sup>197</sup> At least one rule for cable television spaces resembles a designated public forum, while two others resemble limited public forums. All three survived constitutional challenge.

First, the federal government has imposed a common-carrier like requirement, requiring cable systems to carry channels owned by others who pay a fee for carriage.<sup>198</sup>

Second, states can require cable systems to offer access to three sets of speakers: “public access” channels, for any resident, and educational and governmental channels.<sup>199</sup> Upheld generally by the D.C. Circuit,<sup>200</sup> the Supreme Court later addressed several specific limitations imposed on such channels. In that challenge, Justices Anthony Kennedy and Ruth Bader Ginsburg argued that public access channels *should* be treated as designated public forums, even though the spaces are on privately-owned cable systems.<sup>201</sup>

Third, Congress required cable operators to carry local broadcasters, like NBC and ABC affiliates. In 1997, the Supreme Court rejected a First Amendment challenge to the requirement.<sup>202</sup>

*\*Access for cable systems:* While cable companies object to access rules imposed on their own property, they lobby for access rules imposed on others’ property. Congress grants cable companies access to the utility poles of other

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<sup>196</sup> See STARR, *supra* note 13, at 188.

<sup>197</sup>A cable operator (*e.g.*, Comcast or Time Warner Cable) delivers television channels through a wire, usually a coaxial cable. Some channels are available only on cable and pay platforms, such as CNN, MTV, and HBO. Some channels are also delivered for free wirelessly, available merely with an antenna. These include NBC, ABC, CBS, and Fox affiliates, which are called broadcasters. See, *e.g.*, JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, DIGITAL CROSSROADS 360-84 (2005).

<sup>198</sup> See *Time Warner Entm’t Co. v. FCC*, 93 F.3d 957, 968-71 (D.C. Cir. 1996). The Supreme Court, however, permitted governments to exempt some speech from this requirement, which would be unconstitutional on limited public forums. . See *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 791-92 (1996) (Kennedy, J., concurring in part and dissenting in part).

<sup>199</sup> 47 U.S.C. §§ 531, 541 (Westlaw 2011).

<sup>200</sup> *Time Warner Entm’t Co. v. FCC*, 93 F.3d 957, 971-73 (D.C. Cir. 1996).

<sup>201</sup> *Denver Area*, 518 U.S. at 791-92 (1996) (Kennedy, J., concurring in part and dissenting in part).

<sup>202</sup> See *Turner II*, 520 U.S. 180, 189 (1997); *Turner I*, 512 U.S. 622, 661-62 (1994).

companies.<sup>203</sup> By the cable companies' logic, this grant "compels" utility companies to "speak" the hundreds of channels delivered by the cable company. Yet, no First Amendment challenge has succeeded.

*\*Access to satellite spaces:* Congress instructed the FCC to require satellite operators to set aside four to seven percent of total channel capacity to particular speakers: noncommercial, educational, or informational channels. The D.C. Circuit upheld the rule, which effectively created a limited public forum for such speakers on private spaces.<sup>204</sup>

*\*The Phone System:* Beyond indecency decisions,<sup>205</sup> speech scholars often overlook the importance of the telephone network for speech, perhaps because the phone network did not historically support "mass" media or "press." Yet the press and mass media receives no special protection under the Speech or Press Clauses, so the constitutional practice around phone systems informs First Amendment doctrine, whether concerning speech or "press."<sup>206</sup>

Since 1876, phone service has been at least as central to American speech as pamphleteering.<sup>207</sup> Americans use phone "spaces" to contact politicians, raise funds, organize politically (through traditional activist "phone trees" or the recent Obama Campaign phone tools), coordinate socially, talk with reporters, and keep in touch with friends and family.<sup>208</sup> Further, for the past two decades, phone companies have consistently asserted First Amendment claims against regulation and architecting,<sup>209</sup> often with arguments crafted by leading constitutional scholars.<sup>210</sup>

Despite the phone companies asserting such *speaker* rights, the courts generally treat regulation of phone companies to consist of regulating *spaces*. In 1910, government imposed common carrier rules that removed the phone carriers' "editorial discretion" over speech on their lines.<sup>211</sup> Later, government designated *mobile* phone spaces, extending common carrier rule to mobile phone calling.<sup>212</sup> As

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<sup>203</sup> See *Nat'l Cable & Telecomms. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 333-336 (2002).

<sup>204</sup> *Time Warner Entm't Co. v. FCC*, 93 F.3d 957, 975-76 (D.C. Cir. 1996).

<sup>205</sup> See *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 129-31 (1989).

<sup>206</sup> See, e.g., *Citizens United v. FEC*, 130 S.Ct. 876, 943-44 (2010).

<sup>207</sup> See, e.g., Ammori, *Curriculum*, *supra* note 87, at 61.

<sup>208</sup> Indeed, for decades, AT&T was the world's largest company. See PETER W. HUBER ET AL., *FEDERAL TELECOMMUNICATIONS LAW* 16-17 (2d ed. 1999). See also Baker, *Turner*, *supra* note 65, at 94-99 (discussing telephone regulation in the context of free speech doctrine).

<sup>209</sup> The Oxford English Dictionary and Webster's Dictionary both list "architect" as a verb. See Ammon Shea, *Architecting a Verb?*, OUPBLOG (July 31, 2008, 12:35 PM), <http://blog.oup.com/2008/07/architect/>.

<sup>210</sup> See, e.g., sources cited in *supra* note 90. See also *Chesapeake & Potomac Telephone Co. v. U.S.*, 42 F.3d 181, 190-203 (4th Cir. 1994), *vacated and remanded*, 516 U.S. 415 (1996); *700 MHz Auction*, 22 F.C.C.R. 15289, 15294 (2007).

<sup>211</sup> See, e.g., 47 U.S.C. §§ 201 & 202 (Westlaw 2011).

<sup>212</sup> See 47 U.S.C. § 332(c) (Westlaw 2011).

a result, important speech spaces are, and long have been, designated openly as forums for virtual speech.

\**Access to the Internet*: Despite the mythology that government never “regulated” the Internet,<sup>213</sup> government policy has been central to designating Internet spaces for all speakers.

Traditionally, without challenge, access rules were considered presumptively and easily constitutional. While scholars talk about the Internet as receiving “the highest” standard of constitutional protection based on the Supreme Court’s decision in *Reno v. American Civil Liberties Union*,<sup>214</sup> that decision struck down a sweeping indecency law, dealing with a classic “censorship” issue. *Reno* says little about architectural speech issues. In fact, it *assumed*, as background, legal design designating the spaces to the public: “Through the use of chat rooms, any person *with a phone line* can become a town crier with a voice that resonates farther than it could from any soapbox.”<sup>215</sup> Anyone with a phone line could be a town crier *because of* legal architecting: access rules granted everyone access to the phone network, “abridging” phone companies’ “editorial discretion” and “compelling” their speech. For this reason, Steven Gey has characterized *Reno* as invalidating a content-based restriction on a forum *designated* for speech by government.<sup>216</sup> At the same time, even highly sophisticated speech scholars like Martin Redish overlook this fact, arguing that access rules are now unnecessary because of the Internet—even though the Internet historically rested on access rules.<sup>217</sup> If anything, Professor Redish should argue the opposite: the Internet demonstrates the speech benefits of access rules.<sup>218</sup>

Indeed, as newspapers move increasingly to Internet spaces, newspapers should aggressively support the constitutionality of access rules.

\**Access to broadcast spaces*. Broadcasters have been subject to several access rules, some of which been controversial, while others are generally accepted. In the more controversial *Red Lion* decision, the Court upheld access for personally

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<sup>213</sup> See, e.g., Kevin Werbach, *The Federal Computer Commission*, 84 N.C. L. REV. 1, 3-5, 10 (2005).

<sup>214</sup> 521 U.S. 844 (1997).

<sup>215</sup> *Id.* at 870 (emphasis added).

<sup>216</sup> See, e.g., Steven G. Gey, *Reopening the Public Forum--From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1611 (1998) (“[I]t is not unreasonable to suggest that the *Reno* majority opinion itself treats the Internet as a public forum without actually making the designation explicit.”).

<sup>217</sup> See Redish & Kaludis, *supra* note 39, at 1084, 1130–31.

<sup>218</sup> In addition to common carrier dial-up rules, the FCC’s *Computer Inquiries* played a role in providing access to telecommunications networks. See Robert Cannon, *The Legacy of the Federal Communication Commission’s Computer Inquiries*, 55 FED. COMM. L.J. 167, 186-87 (2003). Until 2005, the FCC required at least telephone companies offering high-speed DSL service to permit other ISPs. See, e.g., *Appropriate Framework for Broadband Access*, 20 F.C.C.R. 14853, 14853-57 (2005). Since then, through policy statements, enforcement actions, and finally rules, the FCC has imposed network neutrality requirements, whose constitutionality are now subject to debate. See FCC, *Open Internet*, *supra* note 14, at 77–82.

attacked individuals.<sup>219</sup> In another decision, the Supreme Court upheld an FCC rule designating “reasonable access” to broadcast spaces for federal candidates.<sup>220</sup> The Court held that the rule “properly balances the First Amendment rights of federal candidates, the public, and broadcasters,” and “makes a significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process.”<sup>221</sup>

### 3. Diverse and Antagonistic Sources Across Spaces

The third principle may be the most controversial among academics – that government can promote diverse and antagonistic sources in discretionary speech spaces.<sup>222</sup> While the judiciary furthers diversity of sources in ways also conforming to a negative liberty (through requiring content-neutrality in mandatory and designated spaces), the judiciary also permits government to go one step further and *affirmatively* to promote access by diverse sources to discretionary spaces.

The principle has considerable explicit and implicit support in precedent over the centuries for every major communications medium. The Supreme Court has made it clear that Congress and the FCC can further diversification of sources based not on antitrust law but based purely on First Amendment concerns.<sup>223</sup> In often-repeated language, the Court has repeatedly stated that the First Amendment “rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.”<sup>224</sup> Indeed, the Court has stated that “basic tenet” of our communications policy is faith in this assumption.<sup>225</sup> Judge Learned Hand has declared that we have “staked” our nation on this basic tenet and that First Amendment seeks to ensure “the dissemination of news from as many different sources, and with as many different facets and colors as is possible.”<sup>226</sup> It held, in evaluating cable regulations, that “assuring that the public has access to a multiplicity of information sources” is a “governmental purpose of the highest order, for it promotes values central to the First Amendment.”<sup>227</sup>

This “basic tenet” is a tenet not of censorship but of *architectural design*.

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<sup>219</sup> *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 375 (1969).

<sup>220</sup> *See CBS, Inc. v. FCC*, 453 U.S. 367, 394-96 (1981).

<sup>221</sup> *Id.* at 396-97.

<sup>222</sup> *See sources supra* notes 25, 65, 39.

<sup>223</sup> *See, e.g., FCC v. Nat’l Citizens Comm. for Broad.*, 436 U.S. 775,797-802 (1978).

<sup>224</sup> *Associated Press v. U.S.*, 326 U.S. 1, 20 (1945) (emphasis added).

<sup>225</sup> *Turner I*, 512 U.S. 622, 663 (1994) (citations omitted).

<sup>226</sup> *United States v. Associated Press*, 52 F.Supp. 362, 372 (S.D.N.Y.1943).

<sup>227</sup> *Turner I*, 512 U.S. at 663.

In permitting government to pursue diversity of sources, the courts have been sensitive to the concern of censorship. Their success in balancing architecting and censorship may be no worse or better than its success in other speech areas.<sup>228</sup> But, in striking this balance, courts uphold two broad categories of discretionary design rules as means of advancing diverse sources without much risk of censorship based on message. They are access rules and ownership limits.

*Access rules.* As noted above, rules providing access to virtual spaces provide additional, discretionary spaces to speakers. For example, carriage rules for telephone, telegraph, and Internet increase the diversity of speakers on virtual spaces. So do postal access rules, which resulted in towns having multiple, independently owned newspapers well into the mid-19<sup>th</sup> Century, rather than just the postmaster's preferred newspapers.<sup>229</sup> The same is true of the spaces available solely to particular speakers—including on satellite and cable platforms. Congress generally justifies these rules based on the need to promote diverse sources.<sup>230</sup> Compared to the lack of an access rule, these rules enable more diverse sources speaking on the space.<sup>231</sup>

*Ownership limits.* Ownership limits increase the number of different owners of speech outlets, or “sources,” by limiting the number of outlets any one person can own. These limits burden every person's “speech” right to buy more outlets,<sup>232</sup> and companies often assert such limits abridge their free speech rights to buy more outlets to speak with more people.<sup>233</sup>

That is, they do not seem inspired by negative liberty, value neutrality, or anti-redistribution, and courts do not strike them down out of government distrust. Courts often praise such limits.

Government has imposed ownership limits on *broadcasting* over eight decades and the Supreme Court suggested one of those limits furthered, rather

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<sup>228</sup> See sources cited *supra* note 2.

<sup>229</sup> Until the 1880s and 1890s, for example, nearly all newspapers were independently not chain owned, and larger cities had many competitive dailies. See BENKLER, *supra* note 65, at 185-190; STARR, *supra* note 13, at 252.

<sup>230</sup> See *Turner I*, 512 U.S. 622, 663-68 (1994); *Time Warner Entm't Co., L.P. v. FCC*, 93 F.3d 957, 068, 971-73 (D.C. Cir. 1996); *Satellite Broad. & Comm'ns Ass'n v. FCC*, 275 F.3d 337, 351 (4th Cir. 2001); *Cable Horizontal and Vertical Ownership Limits*, 20 F.C.C.R. 9374, 9376 (2005).

<sup>231</sup> There is a debate over whether diverse sources lead to diverse views. See, e.g., BENKLER, *supra* note 65, at 205-211; Daniel E. Ho & Kevin M. Quinn, *Viewpoint Diversity and Media Consolidation: An Empirical Study*, 61 STAN. L. REV. 781, 860 (2009) (“Neither convergence nor divergence inexorably follows from consolidation.”). The courts generally assume a positive relationship between the two. See, e.g., *United States v. Associated Press*, 52 F.Supp. 362, 372 (S.D.N.Y.1943); *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 797-802 (1978); *Turner I*, 512 U.S. 622, 663 (1994).

<sup>232</sup> *Prometheus Radio Project v. FCC*, 373 F.3d 372, 401-02 (3d Cir. 2004).

<sup>233</sup> See TWE-Fox Brief, *supra* note 90, at 11-15.

than impinged on, First Amendment rights.<sup>234</sup> Congress and the FCC have also imposed ownership limits on *cable* television. With one exception,<sup>235</sup> appellate courts have rejected First Amendment challenges to these limits.<sup>236</sup> Imposing satellite television ownership limits, the FCC has limited how much spectrum a satellite provider can buy at auction<sup>237</sup> and blocked a merger of the two dominant satellite television providers, based partly of the concern for ensuring diverse speech sources.<sup>238</sup>

Ownership limits for the telephone system provide aggressive examples conflicting with the negative-liberty model. Congress has imposed cross-ownership limits, forbidding phone carriers from holding broadcast licenses<sup>239</sup> to reduce the likelihood of one company dominating speech. In 1913, AT&T, then a near-monopoly phone provider, agreed to divest its telegraph lines.<sup>240</sup> In 1984, the Department of Justice broke up AT&T's monopoly. This break-up resulted in local phone monopolies and one competitive long-distance company. The local phone monopolies could not offer "information services," which included a broad range of data services.<sup>241</sup> For decades, their lawyers raised First Amendment objections to such rules.<sup>242</sup> The long distance company also could not offer "electronic publishing" services in the years following divestiture.<sup>243</sup> In the 1982 district court opinion summarily upheld by the Supreme Court, the court held that AT&T's ability to reduce or eliminate competition in electronic publishing threatened "the First Amendment principle of diversity," which had been "recognized time and again by various courts."<sup>244</sup>

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<sup>234</sup> See *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 797-802 (1978) (endorsing the FCC's diversification goal); *Prometheus Radio Project*, 373 F.3d at 383, 401-02; *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 206-08, 224-27 (1943). The FCC's policy has not always succeeded in fostering diversity. See, e.g., ROBERT W. MCCHESENEY, *TELECOMMUNICATIONS, MASS MEDIA, AND DEMOCRACY: THE BATTLE FOR THE CONTROL OF U.S. BROADCASTING, 1928-1935*, at 18-22 (1994).

<sup>235</sup> *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1129-33 (D.C. Cir. 2001) (invalidating FCC's selected ownership limits for lack of substantial evidence under the *Turner* test).

<sup>236</sup> *Time Warner Entm't Co. v. United States*, 211 F.3d 1313, 1316-20 (D.C. Cir. 2000) (rejecting facial challenges to statute directing FCC to adopt horizontal and vertical ownership limits).

<sup>237</sup> See *Direct Broad. Satellite Service*, 13 F.C.C.R. 6907, at \*17-19 (1998).

<sup>238</sup> See *EchoStar Communications*, 17 F.C.C.R. 20,559, 20,575 (2002).

<sup>239</sup> See *Dill-White Radio Act*, ch. 169, 44 Stat. 1162 (1927) (repealed 1934); HUBER, *supra* note 208, at 18-20.

<sup>240</sup> See Joseph H. Weber, *The Bell System Divestiture: Background, Implementation, and Outcome*, 61 FED. COMM. L.J. 21, 22 n.2 (2008).

<sup>241</sup> See *United States v. American Tel. & Tel. Co.*, 552 F.Supp. 131, 189-90 (1982), *affd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

<sup>242</sup> See, e.g., *BellSouth Corp. v. FCC*, 144 F.3d 58, 67-71 (D.C. Cir. 1998).

<sup>243</sup> *American Tel. & Tel. Co.*, 552 F.Supp. at 143, 180-86.

<sup>244</sup> *Id.* at 185.

#### 4. Spaces for Nation-Forming and Local-Community Discourse

With judicial blessing, our government has actively promoted speech spaces to unify disparate parts of the nation and has promoted spaces for distinctly local discourse. Neither of these actions conforms to the negative-liberty model, and legal scholarship has generally overlooked these numerous laws and policies.<sup>245</sup>

The concern for national and local spaces begins with the debates over constitutional ratification. The Framers faced what political philosopher Robert Dahl considers a then-novel challenge: making democracy work in a large disparate nation.<sup>246</sup> Their primary models for democracies were tightly bound city-states and canons, rather than thirteen diffuse states. At the same time, they had to preserve the local autonomy cherished by thirteen independent states. While the nation's federal structure was one answer, another was legally architecting speech spaces to assure both national and local spaces.

*National Spaces.* From the first Congress, postal policy encouraged the availability of *national*, not just local, news in every remote hamlet. First, the government picked up the tab for newspaper editors to send newspapers to other editors across the nation.<sup>247</sup> With this free “exchange of papers,” the *Pennsylvania Chronicle* editors could receive and include news from the *South Carolina Gazette*, the *Maryland Journal*, or Frederick Douglass's *North Star*.<sup>248</sup> Second, coupled with exchange, the government invested heavily in postal roads to the most remote reaches of our nation,<sup>249</sup> binding the nation in shared speech.<sup>250</sup>

*Local spaces.* To ensure spaces for distinctly *local discourse*, the government engaged in several policies across different media.

For newspapers, government adopted very cheap (often free) local mailing to give local papers in every hamlet a cost advantage that outside papers lacked.<sup>251</sup> This way the *Ann Arbor News* faced a price advantage compared to the *New York Times* – or the *Detroit News* – promoting the viability of local outlets.

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<sup>245</sup> Ironically, as noted, scholars often argue that access rules may be unnecessary because of the Internet – though the Internet *itself* relies on access rules. See, e.g., Redish & Kaludis, *supra* note 39, at 1083.

<sup>246</sup> See, e.g., DAHL, *supra* note 35, at 93-95, 106.

<sup>247</sup> See, e.g., STARR, *supra* note 13, at 89-92; KIELBOWICZ, *supra* note 162, at 34.

<sup>248</sup> For a discussion of revolutionary newspapers, see ERIC BURNS, *INFAMOUS SCRIBBLERS passim* (2006).

<sup>249</sup> See, e.g., KIELBOWICZ, *supra* note 162, at 46.

<sup>250</sup> See BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 32-40 (1991) (discussing nationhood and a common literature); LESSIG, *supra* note 1, at 291-93; CASS R. SUNSTEIN, *REPUBLIC.COM 2.0*, at 6 (1997)

<sup>251</sup> See KIELBOWICZ, *supra* note 162, at 31.

Broadcasting policy similarly aimed to promote localism.<sup>252</sup> Broadcast television licenses were assigned to locations with the primary goal of ensuring at least one local outlet for even small communities.<sup>253</sup> The FCC also encouraged stations to cover matters of local concern.<sup>254</sup> The FCC adopted—or relaxed—a range of broadcast ownership limits in an effort to increase the amount (or diversity) of *local* news coverage.<sup>255</sup> Congress provided broadcasters forced access to cable lines partly to further “localism,” as local broadcast stations are more likely than national cable channels to carry local news and affairs programming.<sup>256</sup> Congress also effectively required national satellite broadcasters also to carry local broadcasters, partly for this reason.<sup>257</sup>

Earlier, with AM radio, government sought to mix the availability of local and national speakers. AM radio has been around since the 1920s, while FM radio did not match AM’s popularity until the 1980s.<sup>258</sup> In 1928, under General Order 40, the FCC divided up licenses into those serving local, regional, and (by night) national areas.<sup>259</sup> As a result of this system, Americans had access to stations serving local, regional, and national audiences.

Telephone policy, while focused more on one-to-one than one-to-many communication, has consistently adopted policies ensuring inexpensive local phone calling, subsidized by “burdened” long-distance calls.<sup>260</sup> Long distance calls used to be far more expensive than calling a neighbor.<sup>261</sup>

All of these laws reflect government policy shaping the speech environment to promote national or local spaces, despite the usual assumption that the First Amendment is exclusively or primarily about keeping government out of speech decisions.

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<sup>252</sup> For a recent analysis with additional examples, see Akilah Folami, *Deliberative Democracy on Air: Reinvent Localism - Resuscitate Radio's Subversive Past*, 63 FED. COMM. L.J. 141, 148-157 (2010).

<sup>253</sup> See *Fort Harrison Telecasting Corp. v. FCC*, 324 F.2d 379 (1963); Note, *The Darkened Channels: UHF Television and the FCC*, 75 HARV. L. REV. 1578, 1581 (1962).

<sup>254</sup> See Folami, *supra* note 252, at 153-57.

<sup>255</sup> See, e.g., *Prometheus Radio Project v. FCC*, 373 F. 3d 372, 398-99 (3d Cir. 2004).

<sup>256</sup> See, e.g., *Turner II*, 520 U.S. 180, 189-90 (1997); *Turner I*, 512 U.S. 622, 648-49 (1994).

<sup>257</sup> Congress tied the satellite rules to a compulsory copyright license subsidy. *Satellite Broad. & Communications Ass'n v. FCC*, 275 F.3d 337, 348-49 (4th Cir. 2001).

<sup>258</sup> See *WU*, *supra* note 195, at 133.

<sup>259</sup> See General Order 40, 1928 F.R.C. Ann. Rep. 48 (as found in Supplemental Report for Period from July 1, 1928 to September 30, 1928). See also *Courier Post Publishing Co. v. FCC*, 104 F.2d 213, 214-16 (D.C.Cir. 1939) (discussing the power of AM stations to broadcast nationally at night, because of physics); MCCHESENEY, *supra* note 234, at 12-37 (1994).

<sup>260</sup> See 47 U.S.C. § 254 (Westlaw 2011); NUCHECHTERLEIN & WEISER, *supra* note 197, at 348-55.

<sup>261</sup> See NUCHECHTERLEIN & WEISER, *supra* note 197, at 339-43.

## 5. Universal Access to Speech Spaces

Finally, the fifth principle permits government the discretion to ensure all Americans have access to basic speech spaces.

Government's discretion to extend spaces to all has a large and overlooked impact on American's experienced ability to speak.

Government use of *public* property for universal access is common and generally unchallenged. The postal service deliberately and expensively furthered universal access to newspapers, investing heavily in postal roads and post offices, criss-crossing the nation with more postal roads per capita than any other nation on earth.<sup>262</sup> Government even "burdened" private speakers to ensure universality; beginning in 1792, it forbade private individuals from entering the postal business,<sup>263</sup> to reduce government's cost of serving all Americans.<sup>264</sup> The 1792 law permitted entry, however, where "mail is [not] regularly carried" – also in order to expand coverage.<sup>265</sup> Partly because of such policies, by the early 1800s, newspapers "were more common in America than anywhere else."<sup>266</sup>

Federal and state governments also imposed obligations to further universality through other privately owned virtual spaces: the telegraph, the telephone, broadcast, satellite television, cable television, and Internet access. Governments encouraged build-out of *telegraph* service through the subsidy of providing public rights-of-ways at no charge.<sup>267</sup> Governments have also imposed universality policies for the *telephone* service; federal "universal service" policies required carriers to subsidize low-income, rural, non-commercial speakers, often by requiring higher charges for wealthier, more urban, and more commercial speakers.<sup>268</sup> Formally, these rules restrict the speech of some to redistribute speech resources to others. Annually, billions in industry-specific taxes and subsidies further this goal, which redistributes speech power no less than a tax on Peter's newspaper to subsidize Paul's.<sup>269</sup> *Wireless phone* service is also part of this system.<sup>270</sup> Further the FCC's procedures for granting cellular licenses had the

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<sup>262</sup> See KIELBOWICZ, *supra* note 162, at 46.

<sup>263</sup> See *id.* at 34, 84, 101 (noting that newspapers had a right to negotiate for private carriage and that government permitted private express carriers to send "urgent" mail).

<sup>264</sup> See NUECHTERLEIN & WEISER, *supra* note 197, at 52-55 (discussing the economics of monopoly cross-subsidization).

<sup>265</sup> See STARR, *supra* note 13, at 48.

<sup>266</sup> By 1880, total US weekly circulation exceeded European circulation, even though Europe had ten times the US population. See *id.* at 87, 108, 240.

<sup>267</sup> See *id.* at 171. By the early 1850s, almost every major city had telegraph service. See KIELBOWICZ, *supra* note 162, at 152.

<sup>268</sup> See, e.g., 47 U.S.C. § 254 (Westlaw 2011); HUBER, *supra* note 208, at 531-590.

<sup>269</sup> The Supreme Court has addressed the issue of press-specific taxation. *Leathers v. Medlock*, 499 U.S. 439 444-48 (1991) (discussing previous precedents).

<sup>270</sup> See HUBER, *supra* note 208, at 964-65.

“primary goal” of “nationwide availability of service.”<sup>271</sup> Moreover, government routinely requires build-out of service to an entire service area.<sup>272</sup>

For *broadcasting*, some examples include the television allocation plans in the 1950s, which prioritized rapid, universal deployment;<sup>273</sup> First Amendment objections were not raised in the Supreme Court cases upholding the plan.<sup>274</sup> Beyond geography, government long required broadcasters to serve every segment of society in a locality, even the less profitable segments like children (through children’s educational programming requirements)<sup>275</sup> and the disabled (through closed captioning).<sup>276</sup> As noted above, Congress required both *satellite* companies and *cable* companies to carry broadcast stations, partly to ensure free over-the-air television for all Americans, even those that could not afford pay services.<sup>277</sup> Congress requires state and city governments to ensure that cable is not denied any group based on income level,<sup>278</sup> and localities generally require cable companies to serve the entire community.<sup>279</sup> Finally, for *Internet access*, Congress has required the FCC to promote the deployment to all Americans,<sup>280</sup> and directed the FCC to draft a plan to that effect.<sup>281</sup> In the dial-up era, the FCC refused to cave to phone companies’ lobbyists and classify calls to Internet Service Providers as (then-expensive) long-distance calls, largely to ensure broader access of Internet spaces.<sup>282</sup> The FCC is now transitioning the phone subsidy system to Internet connections.<sup>283</sup>

Litigants have argued such laws requiring cable and phone companies to serve rural and poor areas “compel the speech” of these companies, who must

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<sup>271</sup> See *Cellular Communications Systems*, 86 F.C.C.2d 469, 509 (1981), *modified on recons*, 89 F.C.C.2d 58 (1982).

<sup>272</sup> See 700 MHz Auction, 22 F.C.C.R. 15289, 155348, 15543 (2007) (imposing strict performance requirements); HUBER, *supra* note 208, at 916 (discussing timed build-out requirements for narrowband and broadband PCS).

<sup>273</sup> See sources cited *supra* note 253.

<sup>274</sup> See, e.g., *FCC v. Allentown Broad. Corp.*, 349 U.S. 358, 359 (1955); *Peoples Broad. Co. v. United States*, 209 F.2d 286, 287–88 (D.C. Cir. 1953).

<sup>275</sup> See *Policies and Rules Concerning Children’s Television Programming*, 11 F.C.C.R. 10660 (1996); 47 U.S.C. §§ 303a, 303b; S. Rep. No. 227, 101st Cong., 1st Sess. 17 (1989) (Sen. Report) (defending its constitutionality).

<sup>276</sup> See, e.g., *Motion Picture Ass’n of Am., Inc. v. FCC*, 309 F.3d 796, 807 (D.C. Cir. 2002) (discussing closed captioning rules).

<sup>277</sup> See *Turner II*, 520 U.S. 180, 189–94 (1997); *Satellite Broad. & Communications Ass’n v. FCC*, 275 F.3d 337, 343 (4th Cir. 2001) (citing H.R. Conf. Rep. No. 106-464, at 101 (1999)).

<sup>278</sup> See 47 U.S.C. § 621(a)(3) (Westlaw 2010).

<sup>279</sup> See, e.g., *Implementation of Section 621(a)(1)*, 22 F.C.C.R. 5101, 5116-22 (2007).

<sup>280</sup> See 47 U.S.C. § 1302 (Westlaw 2010).

<sup>281</sup> See *FCC*, *supra* note 13.

<sup>282</sup> NÜECHTERLEIN & WEISER, *supra* note 197, at 297–301 (discussing the history and debate over this “ISP exemption”).

<sup>283</sup> See, e.g., *Connect America Fund*, FCC 10-90, 2011 WL 466775, at \*3, 6 (February 9, 2011).

“speak” by building systems and providing service to those with whom they would rather not speak. Some district court cases, though outliers, have even struck down such rules.<sup>284</sup>

Nonetheless, across the range of these laws, government affirmatively furthers particular values, imposing private burdens, deliberately to “redistribute” speech power.

Finally, spaces required by the judiciary – traditional public forums – serve a universality role. Streets and parks are largely universal, and they benefit all Americans, but disproportionately benefit the “poorly financed causes of little people” who would otherwise lack spaces.<sup>285</sup>

All these examples support the Supreme Court’s often cited “basic tenet”: the “widest dissemination of information” serves the First Amendment.<sup>286</sup>

### III. Normative Implications

As Part II hopefully demonstrates, a concern for speech architecture is an important force in First Amendment doctrine cutting across the full range of communicative spaces.

This Part takes a first step towards exploring some theoretical and doctrinal implications. Because a full normative analysis would require several articles, it provides somewhat abbreviated arguments while discussing the relevant theoretical literature that could help flesh out these arguments in subsequent work.

#### A. Reviewing Doctrinal and Theoretical Implications

Before evaluation, we can review the implications, both for theory (what the principles tell us about the First Amendment’s “meaning”) and for doctrine (how the courts should decide cases).

For theory, these principles suggest (1) an important affirmative role for legislative action, despite the arguments for negative liberty. Further, the architectural principles endorse neither of the two “models” of speech often discussed by scholars – negative liberty or equality of speech resources. Rather the principles emphasize (2) sufficiency of speech-resources for all and (3) diversity of speech sources. Finally, the principles suggest (4) a move beyond affirmative or negative liberty merely being means to promote those ideals.

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<sup>284</sup> See, e.g., *Century Federal, Inc. v. City of Palo Alto*, 710 F. Supp. 1552, 1554 (N.D. Cal. 1987) (applying “the rationale in *Miami Herald*” to scrutiny to strike down build-out rules). *But see* *Telesat Cablevision, Inc. v. City of Riviera Beach*, 773 F. Supp. 383, 399–406 (S.D. Fla. 1991) (applying *Red Lion* to uphold build-out requirement).

<sup>285</sup> *Martin v. City of Struthers*, 319 U.S. 141, 146 (1943).

<sup>286</sup> See *Associated Press v. U.S.*, 326 U.S. 1, 20 (1945).

For doctrine, the principles suggest that (1) particular normative conceptions support the notion that the First Amendment (2) is, and should be, concerned with the availability of speech spaces and (3) should use fairly consistent tests, not a patchwork of exceptions. Specifically, standards of judicial scrutiny do and should permit government to designate additional spaces for all speakers or for broad classes of speakers if government acts even-handedly to promote the architectural principles. These implications are not found in mere dicta or scholarly musings; they reflect the outcomes of cases and decades of constitutional practice of government and also happen to have considerable scholarly support.

## **B. Architecture and Theory**

The theoretical implications of an architectural model are fairly revolutionary and implicate legislative constitutionalism, sufficiency, diversity, and goals beyond negative or affirmative liberty.

### **1. Legislators as Constitutional Norm Entrepreneurs**

First, the principles suggest broad discretion for the legislature in furthering free speech rights. Constitutional scholars have often debated the role of judicial supremacy and have questioned whether legislatures should have role in creating constitutional law,<sup>287</sup> in entrenching constitutional norms, acting as innovative “norm entrepreneurs,”<sup>288</sup> or in supplying remedies that the judiciary cannot to validate judicially-selected rights.<sup>289</sup> As a practical matter, it “may be that not a great deal turns on the difference” among these conceptions, as they all empower the legislature to enforce and interpret constitutional norms.<sup>290</sup> While the literature debating these issues is significant and insightful, the free-speech

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<sup>287</sup> See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* *passim* (2004); TUSHNET, *supra* note 95, *passim*; David J. Barron, *What's Wrong with Conservative Constitutionalism? Two Styles of Progressive Constitutional Critique and the Choice They Present*, 1 HARV. L. & POL'Y REV. (Sept. 18, 2006), [http://www.hlpronline.com/2006/07/barron\\_01.html](http://www.hlpronline.com/2006/07/barron_01.html); Jeremy Waldron, “The Constitutional Conception of Democracy” in *DEMOCRACY* 51, 51-84 (David Estlund ed., 2002).

<sup>288</sup> See WILLIAM N. ESKRIDGE, JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 3, 7-9 (2010).

<sup>289</sup> See Schauer, *Hohfeld's*, *supra* note 39, at 928 (discussing rights under-enforcement and underinclusion); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 885-88 (1999) (suggesting a constitutional right does not exist separately from the available remedy to vindicate that right).

<sup>290</sup> Schauer, *Hohfeld's*, *supra* note 39, at 929-30 (discussing two of the conceptions).

guarantee is often considered a quintessential judicial right, rather than a right fit for a large legislative role.<sup>291</sup>

But, as we have seen, much American speech protection derives from *legislation*. This fact alone might indicate the desirability of legislative actions in speech. Our “venerable” constitutional tradition—which advocates of the negative-liberty model often praise—is partly the result of considerable legislation that furthers the ability of average Americans to be informed about our democracy and to contribute to our discourse. Our tradition suggests that government and the judiciary can *work together*, through judicial content-neutrality tests and through discretion for legislative actions furthering *particular* architectural principles, such as diversity and universality. This constitutional teamwork serves particular ends, leading to laws that further some constitutional norms (the architectural principles) while not violating other norms (including viewpoint-discrimination).

Through this teamwork, the judiciary can benefit from legislative competence and expertise. Legislatures, and agencies, have fact-gathering capabilities to better determine which particular spaces would be valuable for speech in a particular community. Similarly, the legislatures and agencies should be more responsive than the judiciary to popular decision-making to determine which speech spaces should be available. To the extent legislatures open more spaces, the vast majority of speakers receive access to additional discursive spaces.

## 2. Sufficiency (not Equality) in Speech

Second, the principles reflect a concern more for sufficiency than for equality. The distinction between equality and sufficiency is sometimes elusive. We can justify everyone’s right to vote in terms of equality: a democracy must respect all relevant citizens’ equal claim to one particular right. Or we can justify it in terms of sufficiency: a democracy must not supply everyone with equal rights generally (such as economic rights) but merely must provide minimally sufficient rights such as voting, among others. Nonetheless, arguments from equality or from sufficiency can lead to different conclusions. Notably, denying everyone the right to vote would further equality, though not sufficiency, if the vote is considered minimally necessary.

Political philosophers have generally debated using equality or sufficiency as a normative guideline, with some concluding that sufficiency is a more workable and desirable guideline.<sup>292</sup>

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<sup>291</sup> See sources cited *supra* note 94. See also TUSHNET, *supra* note 95, at 131; Owen Fiss, *Between Supremacy and Exclusivity*, 57 SYRACUSE L.REV. 187, 199-200 (2007).

<sup>292</sup> See generally Harry Frankfurt, *Equality as a Moral Ideal*, 98 ETHICS 21-22, 33-35 (1987). See also SWIFT, *supra* note 308, at 92-101 (discussing sufficientarian theories and contrasting them with

An equality norm for freedom of speech includes some problems that a sufficiency norm lacks.<sup>293</sup> To ensure “equality,” as suggested, direct route could be suppression. If everyone is silent, everyone is equal. But silencing speech would decrease speech opportunities and undermine the autonomy of individuals seeking to speak and listen.

Indeed, an example can illuminate the distinction between equality and sufficiency. While the negative-liberty model infers a broad “anti-redistribution principle” from some language in campaign finance cases, a more coherent inference is a principle against equalizing speech through *suppression* rather than through the promotion of *sufficient* opportunities. In *Buckley v. Valeo*,<sup>294</sup> a Supreme Court decision in 1976 that struck down a limit on candidates’ campaign finance expenditures and individuals’ independent expenditures,<sup>295</sup> the Court stated:

The concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to secure the widest possible dissemination of information from diverse and antagonistic sources, and to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.<sup>296</sup>

While the second phrase of this “canonical sentence”<sup>297</sup> includes the basic tenet of favoring diversity and wide dissemination, scholars generally focus on the first phrase, and infer from it that any “limits on speech” inspired by “redistributive” concerns are among a handful of “First Amendment sins.”<sup>298</sup> For example, then-Professor Elena Kagan referred to this phrase simply as “Buckley’s antiredistribution principle,” and stated, despite citing only one decision, that this principle “has ramifications far beyond the area of campaign finance [and] applies as well to a wide variety of schemes designed to promote balance or diversity of

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egalitarianism); Paula Casal, *Why Sufficiency Is Not Enough*, 217 ETHICS 296, 296 n.2 (2007) (collecting sources); see also Fee, *supra* note 39, at 1106 (arguing that “[t]he central guarantee of the freedom of speech is to secure for all citizens plentiful places and means to communicate their ideas to the public”). On the difficulty of specifying a minimum, see JOHN RAWLS, A THEORY OF JUSTICE 277 (1971).

<sup>293</sup> For a critical discussion of the many meanings of equality, see Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

<sup>294</sup> 424 U.S. 1 (1976).

<sup>295</sup> 424 U.S. at 3-4 (internal quotations and citations omitted). *Buckley* also upheld a limit on contributions, but for non-speech, corruption reasons. *Id.* at 23-29. The negative-liberty model suggest that part of the decision is wrong. See Sullivan, *Two Concepts*, *supra* note 39, at 167-170.

<sup>296</sup> 424 U.S. at 48-49 (internal quotations and citations omitted).

<sup>297</sup> See Sullivan, *Two Concepts*, *supra* note 39, at 156 (referring to the first phrase as the “sentence”).

<sup>298</sup> Sullivan, *Two Concepts*, *supra* note 39, at 158.

opinion,”<sup>299</sup> although she cited only one decision for this claim. But, as suggested in the previous Part, many laws redistribute speech resources through access to phone lines, shopping malls, or utility poles. Further, since all property can be used for speech—something recently highlighted by the Supreme Court<sup>300</sup>—all regulations of property could theoretically run afoul of a broad anti-redistribution rule. Rather than propose a rule against any redistribution, *Buckley* can be more narrowly read to its actual language—“restricting” speech merely to equalize it.

On the other hand, beyond restrictions, if government chooses to pursue equality, and to do so by using subsidies not restrictions, government would still face daunting challenges. Aiming for even relative speech-equality could require a complex, value-laden equation ensuring that journalists, janitors, dentists, firemen, and law professors (of varying schools and specialties) all have an equal ability to contribute to discourse. Enunciating the task suggests the problem: government could not measure relative speech power easily, and would have to confer varying amounts for speech subsidies, easily inviting the risk of government using subsidies to “punish” and “reward” messages. The judiciary would likely lack the competence, considering information asymmetries, to determine whether the government is using subsidies merely to promote equality or to punish viewpoints. At the same time, some attempts at equalization would tie a subsidy for one party to the speech of another—such as providing financing when an opponent spends a certain sum—potentially discouraging or at worst suppressing that speech.<sup>301</sup>

A subsidy for sufficiency would likely be widely available and equivalent for all rather than varying for each person in the search for equality. Indeed, many existing speech subsidies are open to all, regardless of the person’s speech power, including access to streets and parks and public access channels, phone systems, and the open Internet. This general availability yields less opportunity for government abuse, and more potential for judicial oversight.

Pursuing sufficiency over equality, however, would not justify restrictions while helping to justify our current system of public funding. The availability of such funds more likely aims to ensure sufficient resources for an election, rather

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<sup>299</sup> Kagan, *supra* note 25, at 464. To support this sentence, she cited the *Tornillo* case that struck down a newspaper right-of-reply and also cited the *dissent* in *Turner* that would have struck down the cable access rule at issue. Therefore, she only cited one majority opinion, which can be justified without an appeal to broad anti-redistribution that would conflict with much in Part II.

<sup>300</sup> *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705, 2725 (2010) (emphasizing money is fungible and that money used for speech could have been used for terrorism).

<sup>301</sup> *C.f.* *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, \*A1\_\_ (2011); *Davis v. Federal Election Comm'n*, 554 U.S. 724, 739-40 (2008). I am not claiming to agree with these decisions. This reading is merely a narrower than anti-redistribution, makes better sense of the cases, and leads to more normatively desirable outcomes.

than equality with the other candidate. For example, in 2008, while John McCain took public funds and therefore limited to spending the \$84.1 million in public funds, Barack Obama did not take the public funds and could spend an unlimited, greater amount.<sup>302</sup> Further, because government provides a specific sum to McCain no matter how much Obama raises or spends, the funds cannot discourage Obama's spending. While the sufficient sum of public funds may depend on how much Obama spends, and so require considerations of relative equality, it could also turn on more independent factors, such as the cost of crisscrossing the nation and purchasing advertisements.

Whether or not we can better understand *Buckley's* "principle" and other campaign finance decisions based on sufficiency, sufficiency principles may better serve free speech because they are less likely than equality to support restriction and more likely to ensure all can contribute.

Of course, sufficiency has its own problems, though these problems are less severe than those associated with equality. Determining a sufficient minimum—for spaces or funds—is not easy.<sup>303</sup> But, as suggested, in determining minimally sufficient spaces, the judiciary can piggy-back on legislative expertise by requiring government to designate spaces even-handedly. If the legislature determines that Republicans need access to the Internet to speak "sufficiently," then the judiciary can determine that Democrats do as well.

### 3. Diversity (not Equality) in Speech

Third, the architectural principles also suggest an often-overlooked distinction between promoting diverse and antagonistic sources and promoting "equality." The canonical sentence in *Buckley* distinguishes between the two in its first two phrases, suggesting *restricting* speech for equality is impermissible partly *because* the First Amendment aims to further diverse sources.

A core principle of the First Amendment is to promote diverse sources, whether or not the Amendment should also pursue equality of speech power. The traditional public forum doctrine enables all to speak on street corners and parks, ensuring diverse sources though not necessarily equality of speech power. For legislated spaces, government can open spaces to all without content- or viewpoint-discrimination, which would likely resulting in speakers with diverse views, if not equal speech power. While the relation between diversity and equality is complex, further scholarship should address these issues without ignoring the core role of diversity in speech theory.

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<sup>302</sup> Fredreka Schouten, *McCain Raises Cash While Limited to Public Funds*, USA TODAY, Sept. 10, 2008 (noting McCain raising cash for Republican groups committed to his election).

<sup>303</sup> See, e.g., Casal, *supra* note 292, at 313 n.46.

#### 4. Negative and Affirmative Liberty as Alternative Means

Finally, while negative and affirmative liberties may be identifiable in judicial decisions, we need not consider them as core principles in themselves. This paper has sought to shake the foundational assumption that the First Amendment is a negative liberty with mere corollaries of government distrust, value-neutrality, and anti-redistribution. It does not argue that affirmative liberty is, instead, core to the Amendment.

First, affirmative and negative liberties are always mixed. While the Supreme Court protects the negative liberty of the flag burner on the street corner from content-based suppression, it also ensures her affirmative liberty to speak on the street corner in the first place. Moreover, as Joshua Cohen suggests, when a government provides “affirmative” access to a shopping mall, it is merely providing speakers a negative liberty against the shopping mall owner (as well as from that owner’s government-sanctioned property rights).<sup>304</sup> Indeed, whenever the court sets some negative boundaries on government’s affirmative acts—such as content-neutrality for designating limited public forums—the result blends affirmative and negative rights.

Second, these liberties are more like means than ends in speech analysis. Negative and positive liberties—often used to denote judicial or legislative action—are mere tools to furthering deeper commitments. To democracy and autonomy, those commitments require wide access to speech spaces, through affirmative *or* negative tools.

#### C. Architecture and Doctrine

Moving from theory to doctrine, I argue that, (1) depending on normative conceptions we choose, we can justify the doctrinal implications of the architectural principles. Doctrinally, the First Amendment should be (2) concerned with the availability of speech spaces, and (3) we should use fairly consistent tests across different spaces. Specifically, (4) whatever the formal standard of scrutiny, so long as government acts even-handedly, government actions should be constitutional when they designate additional spaces for all speakers or for broad classes of speakers. Specifically, government should be able to (5) promote the architectural principles set in this article.

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<sup>304</sup> See Joshua Cohen, “Freedom of Expression” in *PHILOSOPHY, POLITICS, DEMOCRACY: SELECTED ESSAYS* 16, 106-108 (2009).

## 1. Relevant Normative Conceptions of Democracy and Autonomy

Scholars generally normatively evaluate intermediate, middle-level principles such as the architectural principles by reference to more (higher level) general principles and to more (lower-level) specific outcomes. Specifically, here, do the principles lead to practical outcomes furthering the First Amendment's more general principles?

Because of the indeterminacy of the First Amendment's text and original meaning, scholars turn to higher level.<sup>305</sup> While some proposed underlying goals are more specific than others, democracy and individual autonomy are generally the most widely accepted rationales.<sup>306</sup>

But, neither of these terms is self-defining. In fact, defining these terms has been the subject to intense debate among political philosophers (and those in other disciplines) for centuries.<sup>307</sup> The definition of the terms, however, often drives the evaluation. For example, some theorists argue that democracy requires substantive equality (including economic equality) while others justify inequality within a democracy or argue for merely formal equality (or minimal equality).<sup>308</sup> Theorists will defend democracy based on intrinsic reasons of respect for equality or individual autonomy in decision-input and/or based on instrumental reasons of either better decision-making or decisions better promoting autonomy.<sup>309</sup> Some focus on the importance of deliberation in democracy. Deliberative democracy theorists often specify necessary assumptions for discourse.<sup>310</sup> Indeed, in a well-known book David Held sets forth nine different models of democracy; each model has its own variations. These models include classical democracies (direct,

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<sup>305</sup> See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 23-35 (1971).

<sup>306</sup> See *supra* notes 35-37 and accompanying text.

<sup>307</sup> See, e.g., ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 5-7 (1989); HELD, *supra* note 35, at 2-7; SWIFT, *supra* note \_\_, at 180-83.

<sup>308</sup> See, e.g., DAHL, *supra* note 307, at 83-88 (discussing intrinsic equality and democracy); FISS, *supra* note 291, at 201 (calling "equality of all citizens" the "moral foundation of democracy"); David Estlund, "Political Quality" in *DEMOCRACY* 175, 178-79 (David Estlund ed., 2002) (justifying some inequality that can increase the quality of democratic decisions); RAWLS, *supra* note 292, at 303 (justifying inequality under some conditions when promoting "justice," not democracy, under the "difference principle"); JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 269 (Harper & Row 1962) (1942) (formal). See also BAKER, *MARKETS*, *supra* note 65, at 129-54 (contrasting formal democracy conceptions with more substantive theories); ADAM SWIFT, *POLITICAL PHILOSOPHY* 55-67 (2d. ed., 2006) (discussing liberty); Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, 66 LAW & CONTEMP. PROBS. 173, 187-88 (2003) (contrasting formal and substantive conceptions of autonomy).

<sup>309</sup> See, e.g., SWIFT, *supra* note \_\_, at 179-223 (providing an overview).

<sup>310</sup> See, e.g., HELD, *supra* note 35, at xi, 231-258 (discussing deliberative theorists including Jurgen Habermas and Joshua Cohen).

small scale), republicanism, liberal democracy, competitive elitism/technocratic visions, and deliberative democracy.<sup>311</sup> Similarly, First Amendment theorist C. Edwin Baker groups democratic visions into four families—elitist, liberal-pluralist, republican, and a blend of the latter two he calls “complex.”<sup>312</sup> Normative analysis differs based on the choice of conception.

At the same time, theorists define autonomy in radically different ways. Autonomy generally refers to the liberty of an individual to live the life he or she chooses but has variations.<sup>313</sup> First, individuals may be more autonomous if they are actively involved in political affairs of self-governance, freely deciding for themselves the rules governing them.<sup>314</sup> Second, autonomy may entail a lack of external constraints to an individual’s decisions, often termed “negative liberty.”<sup>315</sup> Some theorists focus on government-restraints, while others include other human-made constraints, such as lack of resources.<sup>316</sup> Third, autonomy may refer to overcoming internal constraints such as lack of information; if someone lacks education or access to diverse viewpoints or lifestyles, their impoverished information makes their decisions less autonomous.<sup>317</sup>

Democracy and autonomy are related, as these definitions all suggest. For example, first, if autonomy includes involvement in self-governing decisions, then a democracy is more likely to ensure such involvement than oligarchy, anarchy, or monarchy.<sup>318</sup> Second, and related, when individuals decide for themselves in a democracy, they develop their capabilities and faculties and increase autonomy.<sup>319</sup> Third, if autonomy consists of freedom of overbearing governmental constraints, then a democratic system may best check government overreaching—though an autocrat could in theory respect liberty as much. Fourth, a democracy generally requires institutions of free speech and education that better inform a citizenry of options in making its political and life decisions, thereby serving autonomy. Finally, many theorists argue that a democracy must respect the autonomy of citizens—that subjecting every personal decision (like whom to marry, what to eat that day) would subject citizens to a homogenizing lack of capabilities

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<sup>311</sup> See *id.* at v-vii.

<sup>312</sup> See BAKER, MARKETS, *supra* note 65, at 129-53.

<sup>313</sup> See SWIFT, *supra* note \_\_, at 51-90. Many, but not all, theorists use liberty and autonomy interchangeably. David Miller, “Introduction” in THE LIBERTY READER 1, 2 n.1 (ed. David Miller 2006).

<sup>314</sup> *Id.* at 2-3.

<sup>315</sup> See Berlin, *supra* note 3, at 120-24.

<sup>316</sup> See *id.* at \_\_ (noting that, if someone could not buy bread not because of law but because of lack of resources deriving from others’ institutional decisions, that person would lack negative freedom). See also SWIFT, *supra* note \_\_, at 71-72.

<sup>317</sup> See Benkler, *Autonomy*, *supra* note 37, at 41-72; Miller, *supra* note 313, at 3-4.

<sup>318</sup> See, e.g., SWIFT, *supra* note \_\_, at 204-07.

<sup>319</sup> See ROSS HARRISON, DEMOCRACY 106-08 (1993) (discussing John Stuart Mill).

undermining their effective participation and likely a lack of diversity undermining deliberation reflecting diverse views.

At the same time, depending on the conception, autonomy and democracy can conflict. Indeed, theorists often debate the tension between liberty (or autonomy) and equality (implicit in conceptions of democracy). At a most basic level, democracy might presuppose a voting mechanism; anyone who votes for the losing candidate or position may not be autonomous to the extent that they do not chose the winning candidate or the position “forced” upon them by the majority vote. Others see no tension, as the democratic minorities freely choose to be abide by the results of fair elections.<sup>320</sup>

A second well-known example of the tension consists of constitutional rights and judicial supremacy. A majority of the public might vote to take away an insular minority’s right to vote or its right to free speech, burdening the autonomy of the minority.<sup>321</sup> One resolution is permitting the judiciary to overrule this democratic decision in the name of the minority’s autonomy. Similarly, many argue that the judiciary’s anti-majoritarian decision would further democracy (as well as autonomy) as basic voting and speech rights for all further democracy.<sup>322</sup> This tension is evident in First Amendment decision-making; the constitutional question generally turns on which decisions can be left to the more political institutions and which to the judiciary.

A third well-known tension consists of attempts to promote equality that may burden the autonomy of the few, particularly the privileged. For example, taxing the wealthy to support voter education initiatives might promote democracy/equality while burdening the autonomy of the wealthy to do what they wish with their money. Similarly, promoting democracy by ensuring speech spaces on privately owned shopping malls, wires, and licensed airwaves burdens the autonomy of the private owners. At a general level, one can determine that the autonomy of the private owners should trump,<sup>323</sup> that the democratic benefits of access should trump the autonomy of the owners,<sup>324</sup> or that opening these spaces actually furthers autonomy (not merely equality and democracy) because it furthers the autonomy (in every sense) of all speakers gaining access to the spaces.<sup>325</sup>

As this brief discussion suggests, analysis turns on the definitions of key terms and the normative commitments underlying those definitions. Indeed,

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<sup>320</sup> HARRISON, *supra* note 319, at 1-13; SWIFT, *supra* note \_\_, at 197-200.

<sup>321</sup> See, e.g., sources cited *supra* note 287.

<sup>322</sup> See, e.g., ELY, *supra* note 94, at 101-31.

<sup>323</sup> See, e.g., FISS, *supra* note 65, at 4-7 (arguing against this view).

<sup>324</sup> Baker, Turner, *supra* note 65, at 71 (rejecting autonomy claims of corporations).

<sup>325</sup> See Ronald Dworkin, “Do Liberty and Equality Conflict?” in *LIVING AS EQUALS* 39, 39-43 (Paul Barker ed., 1996).

political scientists' methods of argument often turn on shared assumptions, common sense, claims for which empirical proof is contested or difficult, and examples, anecdotes, and thought experiments. (Just as law and economics analysis rests on a host of assumptions—regarding utility, distribution, Kaldor-Hicks efficiency, and static efficiency—that largely drive analysis.<sup>326</sup>) Some of the leading theorists turn to thought experiments about “ideal” speech situations (for example, Habermas)<sup>327</sup> or an “initial agreement” that people would *likely* accept in a hypothetical “state of nature” (Hobbes, Locke, Rousseau)<sup>328</sup> or behind a “veil” (Rawls).<sup>329</sup>

Rather than attempt a normative analysis applying Held's nine democracy models, Baker's four models, and at least three definitions of autonomy and several conceptions of the overlap and tensions among democracy and autonomy, I simply provide support for the architectural model based on the theories and theorists that *do* support it. My task is simply to show that commonly accepted conceptions of democracy and autonomy support this model evident in precedent, not that every conception does so. Generally, in fact, the more substantive conceptions favor the architectural model. I can leave to later scholarship the task of further analyzing the model.

## 2. Speech Spaces Should be Available

The First Amendment should be concerned with speech spaces, both for democracy and autonomy. Simply, deliberative spaces support democratic debate and further the autonomy of speakers and listeners. This should be seen to outweigh the potential autonomy-burden on private owners. Indeed, many academics concede the First Amendment is concerned with spaces, as evidenced by the public forum doctrine. They also generally conclude that it should be.<sup>330</sup> Many have lamented the inadequacy of the traditional public forum doctrine in ensuring ample spaces for communication.<sup>331</sup> Academics have provided less analysis and support for *legislated* access to spaces, private or public. But, from a

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<sup>326</sup> See, e.g., Martha C. Nussbaum, *Flawed Foundations: The Philosophical Critique of (a Particular Type of) Economics*, 64 U. CHI. L. REV. 1197, 1197-99 (1997).

<sup>327</sup> See e.g., HELD, *supra* note 35, at xi, 231-258 (discussing deliberative theorists including Jurgen Habermas and Joshua Cohen).

<sup>328</sup> See THOMAS HOBBS, *LEVIATHAN* (C.B. Macpherson ed., Penguin Books 1968) (1651); JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., Cambridge Univ. Press 1988) (1690); JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT AND THE FIRST AND SECOND DISCOURSES* (Susan Dunn ed., Yale Univ. Press 2002) (1762).

<sup>329</sup> RAWLS, *supra* note 292, at 11. Legal theorists also turn to idealized examples. RONALD DWORKIN, *LAW'S EMPIRE* 1-5 (1986).

<sup>330</sup> See, e.g., Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 Sup. Ct. Rev. 1.

<sup>331</sup> See, e.g., TIMOTHY ZICK, *SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES*, *passim* (2008).

speaker's point of view, access is as effective whether constitutional or statutory. So long as the judiciary (and the public) remain vigilant for viewpoint or content discrimination, legislative expansion of speech spaces should further rather than restrict freedom of speech. Further, to a speaker, it matters little whether a speech space is publicly owned or privately owned. The speech interests of the property owner and other speakers may conflict, but it is impossible for government (or the judiciary) to avoid making a decision. Siding with the property owner consists of making a choice, not avoiding choice. In light of this required choice, opening a private space would support the autonomy interests of far more speakers and support increased discourse. Siding with the property owners will further the autonomy interests of far fewer individuals and would likely lead to less, not more speech. These considerations point towards opening (many) private spaces to speech.

While the judiciary could require more spaces to be open, conferring the discretion on the legislature enables the public to debate the decision and places the decision with the branch with greater fact-gathering capabilities and flexibility. Further, the judiciary can impose some limits to ensure government not suppress speech or overly burden the autonomy of some owners—such as forcing people to open their homes to speech. Indeed, in *Pruneyard*, the leading case about legislated access to shopping malls, the Court listed several factors that would limit government discretion, including whether a space is more public and if listeners would not attribute independent speech to the property owner.<sup>332</sup>

### 3. Consistent Judicial Tests Should Apply Across Diverse Spaces

If we permit government to open spaces, we should favor the architectural model's consistency across virtual and physical spaces, across private and publicly owned. Generally the law should treat like situations consistently, and distinguish its treatment based on legally relevant, rather than arbitrary, distinctions.<sup>333</sup> The current scholarly conception of speech doctrine—with a standard of negative liberty and multiple exceptions—finds a patchwork of inconsistent, incomprehensible exceptions that has few defenders. It helps to examine this flawed patchwork in determining to replace it.

*First*, public forums have their own tests, depending on tradition or designation.

*Second*, spaces of communications by wire, which traditionally included phone service, received minimal to no scrutiny when government required those spaces open for all,<sup>334</sup> though not when government regulated its content.<sup>335</sup> *Third*,

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<sup>332</sup> See sources *supra* note 111.

<sup>333</sup> See Robert Stein, *Rule of Law: What Does it Mean?*, 18 MINN. J. INT'L L. 293, 296-99 (2009).

<sup>334</sup> See ITHIEL DE SOLA POOL, *TECHNOLOGIES OF FREEDOM 2* (1983).

scrutiny for opening private, physical spaces like shopping malls similarly does not include a narrow tailoring test.<sup>336</sup> *Fourth*, radio and television broadcasters can be regulated subject to a “minimal” scrutiny<sup>337</sup> associated with a decision called *Red Lion*,<sup>338</sup> though a different case applies to indecency.<sup>339</sup> In the D.C. Circuit, satellite broadcasting also receives the *Red Lion* “minimal” standard, though the Supreme Court has not spoken to the issue.<sup>340</sup> As this standard appears tied to wireless frequencies,<sup>341</sup> other wireless technologies may be subject to it, including allocations, assignments, and license conditions for wireless Internet service and “mobile television.”<sup>342</sup>

*Fifth*, television delivery by wire, owned by a cable or phone company, is subject to a standard articulated in a decision called *Turner Broadcasting v. FCC*, decided in 1994,<sup>343</sup> which imposed a narrow-tailoring requirement. That test, however, applies with widely varying ferocity<sup>344</sup> and allows cable companies to assert First Amendment arguments against government attempts to architect cable spaces, perversely allowing challenges to the architectural principles and furthering narrow access and dissemination from the fewest sources.<sup>345</sup> (The next section will discuss both *Red Lion* and *Turner*.)

*Sixth*, newspapers may be treated as “speakers” no less than a pamphleteer, though the Supreme Court has upheld some ownership limits and has assumed the constitutionality of rules affecting what was long newspapers’ primary means of reaching readers – the postal service.<sup>346</sup>

*Seventh*, it is not yet settled where Internet spaces fit in. The FCC has chosen the phone standard, permitting wide discretion.<sup>347</sup> So have some district courts,<sup>348</sup>

<sup>335</sup> See *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126, 130-31 (1989).

<sup>336</sup> See *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 87 (1980).

<sup>337</sup> *Turner I*, 512 U.S. 622, 651-52.

<sup>338</sup> 395 U.S. 367 (1969).

<sup>339</sup> See *FCC v. Pacifica Found.*, 438 U.S. 726, 770 n.4 (Brennan, J., dissenting).

<sup>340</sup> For satellite, there is a circuit split. Compare *Time Warner*, 93 F.3d at 974-77 (applying *Red Lion* to uphold 3% must-carry set-aside for noncommercial stations on satellite) with *Satellite Broad. & Commc’ns Ass’n v. FCC*, 275 F.3d 337, 352-65 (4th Cir. 2001) (applying *Turner* to uphold satellite must-carry regime).

<sup>341</sup> See C. Edwin Baker, *Three Cheers for Red Lion*, 60 ADMIN. L. REV. 861, 866-67 (2008).

<sup>342</sup> See Brief of Free Press, et al. as Amici Curiae Supporting Neither Party at 6, 21-41, *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009) (No. 07-582), 2008 WL 2415162.

<sup>343</sup> 512 U.S. 622 (1994).

<sup>344</sup> Compare *Time Warner Entm’t Co. v. FCC*, 240 F.3d 1126, 1129 (D.C. Cir. 2001) with *Time Warner Entm’t Co. v. FCC*, 93 F.3d 957, 966-67 (D.C. Cir. 1996).

<sup>345</sup> See, e.g., *Time Warner*, 240 F.3d at 1128; *Time Warner*, 93 F.3d at 966-67.

<sup>346</sup> See *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 256 (1974); *FCC v. Nat’l Citizens Comm. for Broad.*, 436 U.S. 775, 797-802 (1978); *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 151-59 (1946).

<sup>347</sup> See *FCC, Open Internet*, 2010 WL 5281676, at \*43-115.

<sup>348</sup> See *AT & T Corp. v. City of Portland*, 43 F.Supp.2d 1146, 1154 (D.Or.1999). *aff’d* 216 F.3d 871, 878 (9th Cir. 2000).

though others have not.<sup>349</sup> While the Supreme Court has selected a standard for Internet indecency, indecency decisions are generally irrelevant for judicial standards concerning architecting.<sup>350</sup> Selecting a standard that requires narrow tailoring of the burden on cable and phone companies (like *Turner Broadcasting's*) would undermine government's ability to engage in basic architecting of Internet spaces without challenges from phone and cable companies asserting their free speech rights.

We should replace this mess. Further, applying the architectural principles would be attentive to practical reality, and would not carve up technologies and spaces based on apparently arbitrary distinctions.

#### 4. "Standards of Scrutiny" Should Track Architectural Principles

In replacing this mess, I propose a simple doctrinal test based on applying the architectural principles. Whenever one discusses a First Amendment problem, a standard question is: "which standard of scrutiny should apply?" There are three canonical standards of scrutiny—strict, intermediate, and rational basis. Each requires an interest (compelling, important, or legitimate, respectively) and each requires tailoring of some sort (a strict narrow tailoring and intermediate narrow tailoring, or rational relation). But we would be better served by simply applying principles rather than one of these tests.

Courts can merely determine whether a law (1) furthers one of the five architectural principles (all of which are likely compelling interests), and (2) does not discriminate among messages or viewpoint or otherwise suppress particular content. Courts can easily determine when an architectural test applies, based on the parties' claims, just as courts apply the tests for libel or copyright infringement.

While this standard is not one of the now standard scrutiny levels, it has several virtues. First, it enables courts to police censorship or speech suppression. Second, in cases involving legislatures opening private spaces, the test clarifies

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<sup>349</sup> See, e.g., *Ill. Bell Tel. Co. v. Vill. of Itasca*, 503 F. Supp. 2d 928, 947-49 (N.D. Ill. 2007) (applying content-neutral speech scrutiny to phone companies' claim of an affirmative First Amendment right to government rights-of-way); *Comcast Cablevision of Broward Cnty., Inc. v. Broward Cnty.*, 124 F. Supp. 2d 685, 691-92 (S.D. Fla. 2000) (analogizing to *Tornillo* to strike down open access rules for cable services that then-applied to DSL and dial-up service).

<sup>350</sup> See *Reno v. ACLU*, 521 U.S. 844, 871 (1997) (addressing a "content-based regulation of speech"); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (same); *FCC v. Pacifica Found.*, 438 U.S. 726, 770 n.4 (1978) (Brennan, J., dissenting) ("[The majority and concurring opinions] rightly refrain from relying on the notion of 'spectrum scarcity' to support their result ... although scarcity has justified increasing the diversity of speakers and speech, it has never been held to justify censorship.") (internal quotations and citations omitted).

that government need not “narrowly tailor” its actions to promote core speech principles.

Opting for a test other than a traditional scrutiny standard has antecedents and benefits. Tests based on principles not rather than scrutiny standards are often effective. Libel against a public figure requires “actual malice,”<sup>351</sup> speech calling for violence must be “directed to inciting or producing imminent lawless action and is likely to incite or produce such action,”<sup>352</sup> and threats must “communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”<sup>353</sup> None of these are usual “standards of scrutiny.” The D.C. Circuit applies a principle, not a standard, to regulations promoting broadcast and satellite diversity: they must merely promote “the widest dissemination of diverse and antagonistic sources.”<sup>354</sup> Indeed, this test conforms with the test I propose.

Choosing the proposed test has benefits. First, this test avoids the danger of importing the wrong standard of scrutiny, while enabling the judges to engage in typical analogistic reasoning. Indeed, several Justices noted a preference for analogies over standards in a case involving complex cable access rules.<sup>355</sup>

Second, using a principle to guide analysis may ensure more transparency than scrutiny standards.<sup>356</sup> While standards appear to limit judicial discretion and avoid the substantive weighing of normative values, courts have considerable discretion to choose and to apply a standard based on largely unarticulated normative considerations.<sup>357</sup> For example, Courts have reached similar conclusions for similar spaces, from shopping malls to cable, telephone, and broadcast

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<sup>351</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).

<sup>352</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

<sup>353</sup> *Virginia v. Black*, 538 U.S. 343, 359 (2003).

<sup>354</sup> *Time Warner Entm’t Co. v. FCC*, 93 F.3d 957, 975 (D.C. Cir. 1996) (“Broadcasting regulations that affect speech have been upheld when they further this First Amendment goal.”).

<sup>355</sup> *Cf. Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 741-42 (1996) (Breyer, J., plurality opinion); *id.* at 777-78 (Souter, J., concurring) (endorsing the plurality’s use of analogies). *But see id.* at 784-88 (Kennedy, J., concurring in part and dissenting in part) (criticizing the plurality’s “evasion” of enunciating a standard).

<sup>356</sup> *See generally* Eric Berger, *In Search of a Theory of Deference: The Eighth Amendment, Democratic Pedigree, and Constitutional Decision Making*, 88 WASH. U. L. REV. 1, 70 (2010) (encouraging judicial candor); Eric Berger, *The Collision of the Takings and State Sovereign Immunity Doctrines*, 63 WASH. & LEE L. REV. 493, 599 (2006) (encouraging courts to “avoid deciding a case without at least testing their convictions”).

<sup>357</sup> *See* TRIBE, *supra* note 2, at 218 (noting some categorization “masks the essentially political nature of the underlying issues by pretending to cabin judicial discretion within the limits established by the category itself.”); Baker, *Turner, supra* note 65, at 116 (“[W]hen taken seriously, these judicial tests can confuse analysis and deflect discussion from the real issues); Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1224 (1984) (arguing forum analysis has been “diverting attention from real first amendment issues”).

systems, but have had to use and bend a collection of different standards to do so.<sup>358</sup> This proposed test is more comprehensible and transparent.

This test is preferable to those proposed by other advocates of architectural regulation. Discussing media regulation, Yochai Benkler, Ed Baker, and Michael Burstein specified tests that, while promising, are either less specific or could more likely lead to the wrong results. Benkler would permit structural regulation of the media (to promote diverse sources and other values) so long as a law's "actual intent and effect are not a censorial wolf in sheep's clothing."<sup>359</sup> He does not put forth more guidance for determining appropriate structural regulation or censorial intent and effect. Baker would similarly permit structural regulation but not "attempts to undermine press performance,"<sup>360</sup> a largely unspecified standard. Burstein proposes a "heightened rational basis" test, similar to that proposed by Justice Breyer for copyright law burdening speech.<sup>361</sup> Both hinge on the law's "rationality," a vague and potentially strict *or* lax standard that does not cut directly to the censorship concern. My test provides more specificity and guidance to both courts and legislatures, and likely would provide more comfort to those seeking judicial limits on both governmental purposes and means of effectuating them.

The test would reject the holding in *Red Lion* and replace the test set out in *Turner*. *Red Lion v. FCC* is merely one of very many broadcast decisions addressing the constitutionality of particular broadcast laws and provisions,<sup>362</sup> though it is the most well-known and perhaps least popular.<sup>363</sup> *Red Lion* upheld (now-repealed) FCC rules that required broadcasters to provide multiple views on controversial matters of public importance and to offer the right of reply to people personally

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<sup>358</sup> See, e.g., *Time Warner Entm't Co. v. FCC*, 93 F.3d 957, 971-73, 974-77 (D.C. Cir. 1996) (upholding cable PEG as content-neutral, but relying on *Red Lion* to uphold the similar noncommercial access rule applying to satellite).

<sup>359</sup> Yochai Benkler, *Property, Commons, and the First Amendment: Towards a Core Common Infrastructure* 30 (Mar. 2001) (Brennan Ctr. for Justice at New York Univ. Sch. of Law, White Paper for the First Amendment Program) [hereinafter Benkler, *White Paper*].

<sup>360</sup> See Baker, *Turner*, *supra* note 65, at 81. He also would conclude that "any law censoring or directed at suppressing individual [rather than media] speech is presumptively objectionable." *Id.* at 62.

<sup>361</sup> See *Eldred v. Ashcroft*, 537 U.S. 186, 244-45 (2003) (Breyer, J., dissenting); Burstein *supra* note 65, at 1065 ("[T]he regulation should be subject to a minimal check for rationality: Is the regulation supported by a plausible economic theory?").

<sup>362</sup> See Marvin Ammori, *Brief of Free Press, et al. as Amici Curiae Supporting Neither Party* at 6, 21-41, *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009) (No. 07-582), 2008 WL 2415162 (explaining that the Court should not lightly reverse *Red Lion's* standard, unless adopting one similar to that argued in this Article, because all of spectrum policy rests on it).

<sup>363</sup> See, e.g., J. Gregory Sidak, *Telecommunications in Jericho*, 81 CAL. L. REV. 1209, 1231 n.63 (1993) (collecting commentary).

attacked by the broadcaster.<sup>364</sup> Scholars, however, generally believe that these rules burdened the broadcasters' editorial discretion and that the broadcasters' fear of complaints likely resulted in less, not more, coverage of controversial matters of public importance.<sup>365</sup> If *Red Lion* is wrong,<sup>366</sup> it is because the upheld rules had a punitive effect triggered by the broadcaster's chosen content that punished content and discouraged controversial speech.<sup>367</sup> Meanwhile, ownership limits do not punish particular content; such limits apply whatever content the outlet chooses.<sup>368</sup> Nor do common carrier or must-carry rules include a content-trigger. Indeed, in 1994, the Supreme Court distinguished *Red Lion* (and the newspaper decision) from the cable access rules, in *Turner Broadcasting v. FCC*, for this very reason.<sup>369</sup>

*Turner* announced a flawed constitutional test, though its holding agrees with my proposed test. *Turner* upheld a statute that required cable operators (like Comcast) to carry local broadcast stations (like a CBS affiliate). The intermediate-scrutiny test announced in *Turner*, however, requires substantial evidence and narrow tailoring and applies when government enacts ownership limits, access rules, and perhaps other rules—laws for cable television. Some lower courts have interpreted the substantial evidence and narrow tailoring requirements to impose significant constitutional barriers to laws designed to promote the widest dissemination of information from diverse and antagonistic sources. As a result, the courts' decisions and tests encourage instead the narrowest dissemination of information from the least diverse sources.

*Turner* requires "substantial evidence" of an "important interest" and intermediate "narrow tailoring." The important interest does not contradict my proposed test: an architectural principle will do. Indeed, in *Turner*, the two "important interests" were universal access to information and promoting access to diverse and antagonistic sources.<sup>370</sup> Under my test, absent impermissible content discrimination, the inquiry would be complete. *Turner*, however, requires narrow tailoring; narrow tailoring means furthering these important interests without burdening "substantially more speech than is necessary."<sup>371</sup> While cable

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<sup>364</sup> *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 373–75 (1969).

<sup>365</sup> See *Syracuse Peace Council v. FCC*, 867 F.2d 654, 656–57 (D.C. Cir. 1989).

<sup>366</sup> The actual principles set forth in *Red Lion* have abiding significance. The Court does not abandon tests merely because they were announced or applied in cases wrongly upholding suppression. See, e.g., *United States v. O'Brien*, 391 U.S. 367 (1968).

<sup>367</sup> Cf. *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, \*A1 \_\_ (2011).

<sup>368</sup> Cf. *News America Publ'g Inc. v. FCC*, 844 F.2d 800, 814 (D.C. Cir. 1988) (pertaining to an ownership limit aimed squarely at particular speakers). But see *CBS, Inc. v. FCC* 453 U.S. 367 396–97 (1982) (upholding a trigger in a case subject to minimal scholarly criticism).

<sup>369</sup> *Turner I*, 512 U.S. 622, 653–57 (1994).

<sup>370</sup> *Turner I*, 512 U.S. at 663.

<sup>371</sup> *Id.* at 665 (emphasis added) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)).

laws affect “speech” among broadcast viewers, broadcasters, cable viewers, programmers, and operators,<sup>372</sup> some lower courts and observers merely ask whether a law at issue burden on the speech of *particular speakers*—the regulated cable companies.<sup>373</sup> It is *this* burden-test that the opponents of network neutrality—and all other media architecting rules—invoke to claim a First Amendment right against regulation. As a result of *Turner’s* narrow tailoring prong, they now have a handful of (wrongly decided) circuit court precedents on their side. The D.C. Circuit once invoked *Turner* to strike down horizontal and vertical ownership limits applying to cable television providers;<sup>374</sup> the Fourth Circuit and other Circuits invoked *Turner* to strike down a rule that required phone companies to serve as common carriers for television content.<sup>375</sup>

As a result of these cases, to this day, corporate lobbyists, as well as scholars, frequently invoke *Turner* as a constitutional obstacle for basic regulation to improve access for all Americans to speech spaces. They go beyond network neutrality and assert *Turner* against rules enabling individuals to choose their own cell phone,<sup>376</sup> enabling cities to franchise cable operators<sup>377</sup> or to require build-out to all citizens in a community,<sup>378</sup> imposing common carriage on text messaging rather than letting a phone company deny access for “controversial” abortion-rights speech.<sup>379</sup> Broadcasters even urge courts to apply *Turner*, rather than *Red Lion*, when they challenge ownership limits because it would give them a better shot at invalidating broadcast limits.<sup>380</sup> Similarly, scholars and the industry assert *Turner* applies to Internet access; almost every argument that network neutrality violates the First Amendment invokes *Turner*.<sup>381</sup> These constitutional arguments

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<sup>372</sup> Justice Breyer’s fifth-vote concurrence in *Turner* even noted “important speech interests on both sides of the equation.” *Turner II*, 520 U.S. 180, 226-27 (1997) (Breyer, J., concurring).

<sup>373</sup> See, e.g., *Time Warner Entm’t Co. v. FCC*, 240 F.3d 1126, 1129-33 (D.C. Cir. 2001); *Chesapeake & Potomac Telephone Co. v. United States*, 42 F.3d 181, 190-203 (4th Cir. 1994), *vacated and remanded*, 516 U.S. 415 (1996).

<sup>374</sup> See *Time Warner*, 240 F.3d at 1137-40.

<sup>375</sup> See *Chesapeake & Potomac Telephone Co.*, 42 F.3d at 186-203; Note, *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062, 1096-98 (1994).

<sup>376</sup> 700 MHz Auction, 22 F.C.C.R. 15289, 15294 (2007).

<sup>377</sup> See, e.g., Press Release, Summary Of Verizon’s Complaint Against Montgomery County, Maryland, June 29, 2006, at 1, <http://newscenter.verizon.com/press-releases/related-items/19887.pdf>.

<sup>378</sup> See, e.g., *id.*

<sup>379</sup> See Comments of Verizon Wireless, *supra* note 23, at 46-58.

<sup>380</sup> *Prometheus Radio Project v. FCC*, 373 F.3d 372, 401-02 (3d 2004); *Fox Television Stations v. FCC*, 280 F.3d 1027, 1045-46 (D.C.Cir. 2002).

<sup>381</sup> See, e.g., Tribe & Goldstein, *supra* note 19, at 5; Yoo, *supra* note 89, at 739-50; Randolph May, *Time for the FCC to Respect the First Amendment*, INSIDERONLINE, Summer 2010, at 15-19; Kyle McSlarrow, Pres. of Nat’l Cable & Telecomms. Ass’n, *Net Neutrality: First Amendment Rhetoric in Search of the Constitution: Remarks Before Media Institute* (Dec. 9, 2009).

not only encourages judicial second-guessing, they also can discourage government action where an agency or legislature understands that a law promoting speech spaces will face constitutional obstacles in court.

Because *Turner's* narrow tailoring prong undermines government attempts to further core architecting principles, the Court should abandon it for cable television and not extend it to any other technologies—particularly to the Internet and offer network technologies.

Abandoning *Turner* has one last virtue. While scholars suggest the negative liberty model protects newspapers, canonically citing the 1974 decision that invalidated a state right-of-reply law,<sup>382</sup> this virtue is overstated practically. Newspapers are migrating to digital platforms like the Internet. If the First Amendment forbids network neutrality, for example, it *requires* newspapers to cut deals for either exclusive or preferred access to the Internet to reach audiences. But newspapers (including the *New York Times*) that do not own cable systems generally have editorialized aggressively in favor of network neutrality.<sup>383</sup> They would benefit from a legal standard encouraging, rather than impeding, such architecting.

## 5. The Five Architectural Principles Have Normative Support

Under some, but of course not all, accepted normative conceptions, the architectural principles are defensible.

*First*, theorists have defended mandatory spaces, both for private reflection and discourse. In a well-known paper and subsequent book, Robert Post has argued that democratic arguments for free speech require a concern for individuals' autonomy—over particular decisions and in particular spaces.<sup>384</sup> Recently, Dan Solove and Marc Blitz have provided powerful arguments for privacy rights rooted in the First, rather than Fourth, Amendment, for similar reasons.<sup>385</sup>

For discursive spaces, many scholars have argued that access to traditional public forums and symbolic spaces furthers democracy, variously defined, and enhances the autonomy of individuals, again variously defined.<sup>386</sup>

*Second*, less often, theorists have defended government's discretion to open spaces to speech. Legislation to open private spaces will likely lead to more

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<sup>382</sup> *Id.* at 464-65.

<sup>383</sup> Editorial, *Network Neutrality Back in Court*, N.Y. TIMES, March 6, 2011, at A20; Editorial, *Keeping the Net Neutral*, L.A. TIMES, Dec. 2010.

<sup>384</sup> See sources *supra* note 129.

<sup>385</sup> See Blitz, *supra* note 120, at 357, 362; Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112, 113-120(2007).

<sup>386</sup> See, e.g., CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 241 (1995).

discursive spaces than lack of such legislation.<sup>387</sup> More spaces will promote democratic discourse and enhance the autonomy of many more who access the spaces, at the more minimal cost to the autonomy of a few private owners (e.g., phone companies, mall owners) generally seeking economic rather than democratic objectives. Indeed, it is this legislative discretion that helps justify the negative-liberty model's "exception" for traditional public forums. The analysis here suggests that judicial-affirmative spaces may be exceptions not to negative liberty regarding individual speech but to vast government discretion in opening spaces. While streets and parks may not be sufficient for robust debate of all issues in a democracy, they may be sufficient to ensure that the public can have input in determining whether to open more spaces and how much space to open.<sup>388</sup>

*Third*, theorists (and judges) have generally argued that rules promoting diverse sources serve "values central to the First Amendment." Yochai Benkler has provided perhaps the most robust defense of the First Amendment's relation to promoting diverse sources, particularly arguing that diversity of sources supports both democracy and autonomy.<sup>389</sup> He has also responded to arguments that diversity leads to polarization and balkanization, on the one hand, or that concentrated speech systems better check government power, on the other.<sup>390</sup> Ed Baker argues that society should not risk consolidating speech outlets in the hands of a few people, granting them the ability to dictate policy, or greatly influence policy, to their preferred ends.<sup>391</sup> Prominent examples include Silvio Berlusconi in Italy, who used his media empire to become Italy's longest serving (extremely corrupt) prime minister,<sup>392</sup> and the Associated Press-Western Union in our history, which influenced elections and legislation.<sup>393</sup> Little suggests that a system with such dominant speakers, ineffectively checked by other sources, would lead to better decisions or a more participatory decision-making than to a more diffuse media system. While many researchers and academics have argued that negative liberty and free market economics would lead to diversity of views under

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<sup>387</sup> The market will likely lead to fewer spaces. Rather than opening all malls, some malls could silence speech. And, in virtual spaces, the market will not necessarily lead to openness. Communications industries are concentrated, rather than competitive. See BAKER, MARKETS, *supra* note 65, at 7-62. They are subject to overwhelming economies of scale and network effects. See NUECHTERLEIN & WEISER, *supra* note 197, at 1-30. Their owners have incentives to discriminate against some content rather than to carry all content. See BARBARA VAN SCHEWICK, ARCHITECTURE AND INNOVATION 298-354 (2010).

<sup>388</sup> See ELY, *supra* note 94, at 101-31.

<sup>389</sup> See BENKLER, *supra* note 65, *passim*.

<sup>390</sup> *Id.* at 234-71.

<sup>391</sup> See BAKER, OWNERSHIP, *supra* note 65, at 16.

<sup>392</sup> See, e.g., Enrique Armijo, *Media Ownership Regulation: A Comparative Perspective*, 37 GA. J. INT'L & COMP. L. 421, 439-45 (2009).

<sup>393</sup> See WU, *supra* note 195, at 22-25.

particular conditions, whether or not there is diversity of owners,<sup>394</sup> others have disagreed with the assumptions,<sup>395</sup> argued against taking that risk,<sup>396</sup> or point to research demonstrating links between ownership and viewpoint diversity.<sup>397</sup> If ownership does not matter for the diversity of speech, then owners' claims of "speech" rights rest on a thin reed.

The risk of government censorship through promoting diverse sources is not high considering the proposed judicial constraints and history of architecting. Indeed, a negative liberty may lead to a few powerful commercial speakers, on whom government can more easily lean to stifle dissenting or challenging speech without judicial process. As Yochai Benkler has recently argued based on the government's reaction to Wikileaks, government can lean on several powerful private companies indirectly to silence more speech than government could silence *directly*.<sup>398</sup>

*Fourth*, theorists have defended both spaces designed to discuss matters of local concern and those to promote national speech.<sup>399</sup> Based on economies of scale, modern communications technologies often favor national content and national speakers. So laws ensuring virtual or physical spaces for local discourse can counteract this national focus.

Regarding spaces for national speech, Robert Dahl has discussed the challenge of adopting democracy in a large-scale, pluralist nation, and the role of

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<sup>394</sup> See, e.g., Jack H. Beebe, *Institutional Structure and Program Choices in Television Markets*, 91 Q.J. ECON. 15, 35-36 (1977); Daniel Ho & Kevin Quinn, *Viewpoint Diversity and Media Consolidation: An Empirical Study*, 61 STAN. L. REV. 781, 789 (2009).

<sup>395</sup> See BENKLER, *supra* note 65, at 165-169, 205-07; Ho & Quinn, *supra* note 394, at 794-98 (discussing scholarly dissensus).

<sup>396</sup> See, e.g., BAKER, OWNERSHIP, *supra* note 65, at 16 (arguing "no democracy should risk the danger," however small, of a dominant media mogul controlling politics).

<sup>397</sup> FCC, 10 RESEARCH STUDIES ON MEDIA OWNERSHIP - 7/31/07, <http://transition.fcc.gov/ownership/studies.html> (studies and critiques reaching different conclusions). Some suggest that media companies are unlikely to critically discuss their corporate owners. See, e.g., 2002 Biennial Regulatory Review--Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 18 F.C.C.R. 13,620, 13,764-65 (2003) ("we do not dispute [the anecdotal] that a particular outlet may betray some bias, particularly in matters that may affect the private or pecuniary interest of its corporate parent"); Michael Kinsley, *Slate and Microsoft*, Dec. 26, 1997, <http://www.slate.com/id/2217/>.

<sup>398</sup> See Yochai Benkler, *A Free Irresponsible Press: Wikileaks and the Battle Over the Soul of the Networked Fourth Estate*, 46 HARV. C.R.C.L.L. REV. (forthcoming 2011). Cf. also Andrei Soldatov, *Kremlin's Plan to Prevent a Facebook Revolution*, MOSCOW TIMES, Feb. 28, 2011, available at <http://www.themoscowtimes.com/opinion/article/kremlins-plan-to-prevent-a-facebook-revolution/431725.html>.

<sup>399</sup> Indeed, the traditional public forum and other designated physical forums are likely to ensure speech about local matters.

press in addressing the challenge.<sup>400</sup> Benedict Anderson's classic text *Imagined Communities* discusses the role of a common culture and printing press in providing social cohesion among disparate individuals, and national sources of information can play a similar cohesive role.<sup>401</sup>

*Fifth*, wide dissemination of information, or universal access to speech spaces, ensures that all Americans have basic speech resources, from phones to Internet connections to television signals, to participate in our democracy and to further their autonomy. Indeed, some empirical research suggests that rural areas having access to new communications technologies, such as the radio, are better able to affect government policy than other rural areas.<sup>402</sup>

#### **D. Rejecting Prominent Objections**

Critics could proffer several specific objections that mix descriptive doctrinal arguments and normative arguments. Essentially, the objections suggest that the architectural principles conflict with more important First Amendment principles—negative liberty principles and the public-private distinction—or are more dangerous to accept than to reject. These objectives are worth addressing specifically.

##### **1. Conflict with Underlying Principles**

First, we can easily reject the usual objection common in previous literature—that we must reject architectural principles because they conflict with the First Amendment is underlying principle of negative liberty and corollaries of government distrust, value-neutrality, and anti-redistribution. These principles cannot be normative guidelines unless we accept two fallacies--inferring general principles from a small select sample and then arguing these principles “ought” to be because they “are.” As I demonstrated, in somewhat painstaking detail, our venerable tradition also includes the architectural principles, not merely negative-liberty principles, so this prominent objection fails.

##### **2. Slippery Slope of Government Action**

Second, critics may proffer a slippery slope argument. They may argue that permitting government to regulate private actors to ensure greater access would eventually lead to government censorship. Essentially, our history shows that

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<sup>400</sup> See DAHL, *supra* note 35, at 93-95, 106.

<sup>401</sup> See ANDERSON, *supra* note 250, at 32-40.

<sup>402</sup> See, e.g., David Stromberg, *Radio's Impact on Public Spending*, 119 Q. J. OF ECON. 189, 189 (2004).

government will try to censor speech if granted discretion. Not only will legislatures try to stifle speech, but courts will also eventually fail to stop them.

This objection is probably right to doubt both legislatures and courts. Governments often try to suppress speech, as evidence by cases here and abroad. Further, judges in the US have often collaborated in suppressing speech; despite “pathological” government distrust,<sup>403</sup> courts continue to uphold censorship, often in wartime.<sup>404</sup>

But in our venerable tradition, common carrier rules have not resulted in a history of censorship.<sup>405</sup> When we also consider ownership limits, designated public forums, and most access rules, our tradition suggests that the Court has managed to limit the risk of censorship when government opens spaces for speech. Or, at least, the court’s record here is no better or worse than its checkered record else regarding censorship.<sup>406</sup> The judiciary has largely balanced, and therefore apparently *can* balance, the benefits of government opening spaces to speech against the costs of government using such laws to engage in censorship. The judiciary has done so through doctrines, such as viewpoint-neutrality, that fall far short of requiring government to “stay out” altogether. While the task of deciphering viewpoint-discrimination is difficult, it is the same task that courts accept for all First Amendment cases, including limited-public-forum cases. Courts do not usually need a prophylactic rule to obviate the inquiry altogether — for engaging in redistribution or some other supposed First Amendment sin.

Moreover, this objection may have it backwards. The slippery slope or pathological concern may counsel in favor of architectural principles. Design can complement doctrine, which has been marked by the Court’s repeated failures during wartime.<sup>407</sup> Government can create the equivalent of “constitutional” restraints through architecture. In Lessig’s words, “What checks on arbitrary regulatory power can we build into the design of the space?”<sup>408</sup> As discussed in relation to Benkler’s work on Wikileaks, a concentrated speech system controlled by a few speakers and few open spaces empowers government to manipulate a few outlets and suppress critical news, including during wartime.<sup>409</sup> Moreover, a

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<sup>403</sup> See Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449-450 (1985).

<sup>404</sup> See sources cited *infra* note 2.

<sup>405</sup> Unrelated to common carrier rules, government has tried to censor indecent phone calls. But the Court has succeeded in stopping these attempts, even on spaces subject to access rules. See *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126, 130-31 (1989).

<sup>406</sup> See sources cited *supra* note 2.

<sup>407</sup> See sources cited *supra* note 2.

<sup>408</sup> LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* 7 (1999).

<sup>409</sup> See, e.g., Benkler, *supra* note 398; Gregory P. Magarian, *The First Amendment, the Public-Private Distinction, and Nongovernmental Suppression of Wartime Political Debate*, 73 GEO. WASH. L. REV. 101, 115-127 (2004).

society with plentiful speech spaces for all speakers would support a democratic *culture* of speech, as Jack Balkin has argued,<sup>410</sup> increasing the difficulty of imposing censorship in perilous times, as an engaged public with a culture of free speech could be more prone to free speech.

### Conclusion

This Article argues that the availability of spaces for speech is a central concern for First Amendment doctrine. Its analysis demonstrates that this doctrinal concern has cut across the range of physical and virtual spaces, on public and private property. Indeed, the doctrine reveals at least five important architectural, doctrinal principles that are evident, often explicitly, in judicial decisions. While these principles may conflict with scholars' conventional wisdom that the First Amendment exclusively or primarily focuses on negative liberty, scholars cannot provide a compelling analysis of the First Amendment's normative underpinnings if they choose to categorize the many cases revealing these principles as mere exceptions. The First Amendment should be, and has been, concerned with more than merely ensuring that government stays out of speech and respects negative liberty. That Amendment is concerned with ensuring Americans have access to ample spaces for both discourse and autonomy, and should enable government to further principles long accepted to further that goal.

Judges and legislators should incorporate these insights into their understanding of what the First Amendment *means* at its very core. Doing so will lead to a richer and more normatively defensible understanding of the First Amendment. It will also inform the constitutive decisions regarding the virtual speech spaces increasingly necessary for our democracy and our liberty.

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<sup>410</sup> See Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 33-38 (2004).