FIRST AMENDMENT ARCHITECTURE

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The right to free speech is meaningless without some place to exercise it. But constitutional scholarship generally overlooks the role that judicial doctrine plays in ensuring the availability of spaces for speech. Indeed, scholarship generally characterizes doctrines that are concerned with speech spaces, such as public forums and Internet forums, as "exceptions" to "standard" First Amendment analysis. 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: they claim that the concern for spaces is only peripheral, "exceptional," and at odds with "standard" First Amendment understandings. 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 recognize the logic underlying important doctrinal areas and has failed to explore what these doctrines reveal about the First Amendment's core normative underpinnings.

This Article adopts a different approach. Rather than making the descriptive assumption that free speech doctrine is unconcerned with spaces, this Article identifies and interprets the Court's role in ensuring, requiring, or permitting government to make spaces available for speech. This Article identifies five persistent judicial principles across a range of physical and virtual spaces. These principles are evident in precedent and practice that either require or permit government to ensure spaces for speech—in order to promote particular, substantive speech goals. Further, rather than quarantining these speech principles as exceptions to the "standard"

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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. This Article provides timely guidance for legislators and judges, as it should inform statutory and constitutional decisions for shaping access to the technology-enabled virtual spaces increasingly central to Americans' discourse, to our liberty, and to our democracy.

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 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. Further, any government agency, including a local transit agency, can shut off mobile communications services in transit stations.[1] He would turn to newspapers, but they can, and most

1. *See, e.g.*, Marvin Ammori, *SF BART: Silencing Phones, Stifling Protests, Violating Freedom of Speech?*, BALKINIZATION (Aug. 12, 2011, 7:08 PM), http://balkin.blogspot.com/2011/08/sf-bart-silencing-phones-stifling.html.

likely will, decide not to publish what he writes; 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,[2] Ed visits his neighbor and complains, "This country doesn't 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. Anyone is free to say whatever he wishes, wherever he has a right to speak."[3]

This hypothetical nation without speech spaces is not the United States, but it would resemble the nation if our Supreme Court had adopted First Amendment scholars' "standard" model of the First Amendment. This standard model is grounded in venerable cases forbidding censorship, but is concerned almost exclusively with ensuring that speakers enjoy negative liberty—a freedom from government involvement in speech.[4] The scholars' "standard" solution in most cases is simple enough: government should stay out entirely.[5]

Our nation is not Ed's primarily because of what scholars consider to be judicial "exceptions" to their standard model of negative liberty.[6]

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2. Not all constraints are legal or governmental. *See, e.g.*, LAWRENCE LESSIG, CODE 120–29 (2d ed. 2006) (categorizing constraints, including law, markets, norms, and architecture); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 470–78 (1923) (discussing private coercion, public coercion, and their interrelation).

3. This cannot be said of the United States historically. *See, e.g.*, *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2731 (2010); *United States v. O'Brien*, 391 U.S. 367, 385–86 (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).

4. *See, e.g.*, ISAIAH BERLIN, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 118 (1969); BENJAMIN CONSTANT, *The Liberty of the Ancients Compared with That of the Moderns*, *in* POLITICAL WRITINGS 309, 316 (Biancamaria Fontana ed. & trans., 1988); *cf.* Hale, *supra* note 2, at 470–78 (suggesting negative liberty rests on positive liberty). For an influential critique of Berlin's distinction between positive and negative liberty, proposing a triadic relationship of freedom *from* X constraint *to* engage in Y action, see Gerald C. MacCallum, Jr., *Negative and Positive Freedom*, 76 PHIL. REV. 312 *passim* (1967).

5. *See* discussion *infra* Part I.B–C.

6. *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

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. Moreover, this scholarship suggests that few if any of these important exceptions are even justifiable.[7]

Some judicial doctrines require the political branches to ensure access to spaces. Scholars consider the traditional public forum doctrine to be an "exception" to the negative-liberty model.[8] It is an exception because courts affirmatively require traditional public forums such as public streets and public parks to be open for speakers. To this day, these spaces remain important speech areas not merely for crackpots, but also for politically consequential Tea Parties gathering in Washington, D.C., teachers' unions assembling in Madison, Wisconsin, and the Occupy movement from Wall Street to Los Angeles.[9]

Other exceptions do not entail the judiciary *requiring* spaces, but entail the judiciary merely *permitting* government to open up spaces for public discourse. Courts routinely reject constitutional objections to government laws providing access to additional spaces beyond traditional public forums—both to physical and virtual spaces,[10] on both public *and* private property. These spaces include shopping malls, phone networks, cable networks, and wireless networks, among others. Despite the standard model's guiding principle that government not interfere with speakers' decisions and respect their negative liberty, judicial doctrines have consistently permitted government interference to ensure affirmative access even to many spaces owned by private

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obscures the correct focus of constitutional discourse: the requisites of the Constitution." (internal citations omitted)).

7. For some scholarship concerned with spaces, however, see JOHN D. INAZU, LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY *passim* (2012); TIMOTHY ZICK, SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES *passim* (2009) (perhaps the leading monograph on the subject); 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).

8. *See infra* notes 54–55 and accompanying text.

9. *See, e.g.*, Stephanie Condon, *Koch-backed Group, Tea Party Mobilize in Wisconsin*, CBS NEWS (Feb. 23, 2011, 11:15 AM), http://www.cbsnews.com/8301-503544_162-20035345-503544.html; *About*, OCCUPYWALLSTREET, http://occupywallst.org/about/ (last visited February 8, 2012).

10. For our purposes, "virtual" spaces are those that connect speakers through a medium: a phone wire, a wireless signal, or the postal service. *See, e.g.*, J. M. Balkin, *Some Realism about Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 412 (referring to "modern technological equivalents of traditional public forums—for example, radio and television"); Mark A. Lemley, *Place and Cyberspace*, 91 CALIF. L. REV. 521, 521–23 (2003).

parties. The standard model must recognize doctrinal "exceptions" for regulating access—to phone systems, to broadcast systems, to cable systems, and to shopping malls—and different, *sui generis* exceptions applicable to each space.[11] Because the standard model views each doctrine as exceptional and different, 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 framework for figuring out this question.[12]

In sum, according to the scholars' dominant model of the First Amendment, doctrines covering speech spaces comprise a messy collection of exceptions to a negative-liberty model—a model that would otherwise require no affirmative access to spaces and would forbid government from opening privately owned spaces to speech in violation of negative liberty. With no coherent alternative model to the standard model that is believed to further the First Amendment values, scholars increasingly urge the courts to adopt the negative-liberty model as the one true religion and extend the model to all new spaces and technologies.[13]

The stakes for our democracy are both significant and timely. If the Supreme Court extends the negative-liberty model to certain new spaces, it can drastically limit the speech spaces available to and used by average Americans.[14] Take one example: network neutrality. In December 2010, the Federal Communications Commission (FCC) adopted a "network neutrality" rule.[15] This rule prohibits phone and cable companies from blocking, or discriminating among, websites and online software.[16] As a result of the rule, Americans can more effectively access the "cyberspaces" for speech without interference (or "editing") by phone and cable companies asserting their own speech rights. Largely because of network neutrality's role in opening up access to Internet spaces, some U.S. senators and a few legal scholars,

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11. *See infra* notes 56–62 and accompanying text.

12. *See* John Schwartz, *Shouting Porn! on a Crowded Net; At the Supreme Court, Nine Justices in Search of a Metaphor*, WASH. POST, Mar. 30, 1997, at C01 (describing oral argument where Justices sought a doctrinal analogy for the Internet).

13. *See infra* notes 40–49 and accompanying text.

14. *See, e.g.*, PAUL STARR, THE CREATION OF THE MEDIA: POLITICAL ORIGINS OF MODERN COMMUNICATIONS 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 (2010), *available at* http://www.broadband.gov/plan/ (offering a plan to extend digital spaces to all, many aspects of which apparently conflict with the negative-liberty model).

15. Preserving the Open Internet, 25 FCC Rcd. 17,905, 17,984–91 (2010) (to be published in the *Federal Register* and codified at 47 C.F.R. pt. 8).

16. Preserving the Open Internet, *supra* note 15, at 17,906–07.

including me, have asserted that network neutrality furthers free speech goals and is "the First Amendment issue of our time."[17] In March 2011, two U.S. 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."[18] Over two million citizens, every major consumer group, civil liberties groups like the ACLU, and liberal and conservative churches voiced support for the principle guaranteeing access to these cyberspaces.[19]

To the standard scholarly model, however, network neutrality does not further the First Amendment but offends it. The First Amendment should forbid the government from making decisions about the private speech transmitted or edited by *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 scholars, Harvard professor Laurence Tribe,[20] filed a brief to the FCC making this argument.[21] While network neutrality might favor nice-sounding goals like equality and redistribution, he wrote, it would conflict with "a central purpose of the First Amendment," which is "to prevent the government from making

17. *See* Al Franken, *Net Neutrality Is Foremost Free Speech Issue of Our Time*, CNN (Aug. 5, 2010), 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. INTER ALIA, Dec. 17, 2010, http://yalelawandpolicy.org/29/the-first-amendment-issue-of-our-time.

18. Letter from Al Franken & Ron Wyden, U.S. Senators, to Mary L. Schapiro, Chairman, U.S. Securities and Exchange Comm'n (Mar. 9, 2011), *available at* http://wyden.senate.gov/download/?id=b053a5d5-afe5-4a48-b9a3-519193006a60.

19. *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/ (last visited Feb. 8, 2012). *But see* Ted Hearn, *Mad Money; 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.

20. On other First Amendment issues, we have agreed. *See, e.g.*, Marvin Ammori, *Controversial Copyright Bills Would Violate First Amendment—Letters to Congress by Laurence Tribe and Me*, BALKINIZATION (Dec. 8, 2011, 1:36 PM), http://balkin.blogspot.com/2011/12/controversial-copyright-bills-would.html.

21. 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.

just such choices about private speech."[22] Quite simply, even if government means well, it must stay out entirely. Even though Professor Tribe is naturally the most notable proponent of this argument, he is not alone.[23]

The network neutrality rule, now on appeal, may eventually provide the Supreme Court with the opportunity to determine whether an exception to the negative-liberty model, or the negative-liberty model itself, will apply to laws providing Americans access to speak on the Internet. On the other hand, 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[24]—would interfere with the phone company's speech discretion, inserting government bureaucrats into private speech decisions.[25] Rules requiring cable companies to serve all local residents would be seen as forcing them to speak to those they would rather avoid and imposing government values on private speech, rather than being perceived as extending speech spaces to all.[26] 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, the central First Amendment purpose echoed by Professor Tribe is to keep government out of speech.

This Article disagrees with that conclusion. It challenges both the common assumption that the negative-liberty model descriptively reflects First Amendment precedent (despite minor "exceptions"), and the normative defense of extending that model to all speech spaces. Rather, this Article argues that First Amendment doctrine governing speech spaces appears to be a mess largely because most scholarship has persistently applied the wrong model for thinking about these

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22. *Id.* at 2.

23. *See infra* notes 94–96 and accompanying text.

24. *See* Adam Liptak, *Verizon Rejects Text Messages from an Abortion Rights Group*, N.Y. TIMES, Sept. 27, 2007, at A1.

25. *See* Comments of Verizon Wireless, In the matter of Petition of Public Knowledge, et al., WT Dkt No. 08-7, March 14, 2008, at 46–58 (FCC), *available at* http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519866994.

26. Some courts have agreed with this assessment. *See infra* note 296 and accompanying text.

issues. This model derives the First Amendment's central purpose by inferring principles from a few, select, paradigmatic cases, while categorizing an enormous number of equally important cases as mere exceptions that reveal nothing about the First Amendment's central purposes. The model is much like concluding that the universe revolves around the earth, taking the moon's orbit as evidence of the "core" principle, and then determining all the other orbits are subject to confused exceptions. A better model, which more accurately understands the role of the sun, the planets, and the moons, would enable us better to anticipate the existence of undiscovered planets and stars—just as a better model of the First Amendment would enable us better to anticipate and confront emerging challenges from new technologies and speech problems.

In this Article, I propose that better model, one that seeks to identify and defend unifying principles across "exceptional" speech doctrines governing discursive spaces and to explore what those principles say about the First Amendment that the standard 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*, identifiable free speech principles. While there are some outlier cases, these principles are reflected implicitly 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 to the public. The format of its argument, to trace and defend key principles in First Amendment precedent, reflects the same format as many of the most influential articles in the Amendment's history—including those by Zechariah Chafee, John Hart Ely, Elena Kagan, Frederick Schauer, and Geoffrey Stone.[27] This Article does so partly to refute a common argument: that, whatever the theoretical benefits of ample speech spaces, a

27. *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"); John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (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 (2004); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983); *see also* 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) (discussing other such "precedentially grounded work").

constitutional concern with such spaces would violate the First Amendment's purposes inferred descriptively through precedential analysis. This Article demonstrates that the principles favoring universal, ample access to speech spaces should not be considered "exceptional" add-ons to core, foundational principles defining the First Amendment's meaning.

Specifically, this Article identifies five principles that generally reflect a *requirement* that government ensure minimal spaces for all as well as *discretion* for government to provide additional spaces if the government does so even-handedly or to further certain preferred substantive speech purposes that go far beyond a mere "negative liberty." These substantive speech purposes include promoting spaces for all speakers, specifically for local speakers or for national speakers, for diverse and antagonistic speakers, and extending spaces 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" speech principles, as they concern the availability of speech spaces, the conditions of their availability, and effectively the design or structure of American communication. This Article sets out this architectural model of the First Amendment and details the precedential evidence demonstrating that courts have implicitly followed it.

Further, it explores and defends the normative implications of the model. It demonstrates that the precedent's architectural principles lead to outcomes furthering the two most widely accepted rationales underlying the free speech guarantee—democracy and autonomy. Further, while scholarship often debates important affirmative or egalitarian values in precedent,[28] 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.[29]

While this Article builds on the sophisticated and important analyses of C. Edwin Baker, Jack Balkin, Yochai Benkler, Owen Fiss, and others, it does so in several novel ways.[30] It does so, for example, by marshalling far more precedential evidence across a range of spaces; by distilling substantive and doctrinal principles with the specificity necessary for judicial administrability; by demonstrating the principles' consistency across *both* physical and virtual spaces, rather than focusing on one or the other; by establishing the important but

28. *See infra* notes 62–68 and accompanying text.
29. *See infra* Part III.B.2.
30. *See, e.g.*, *infra* notes 405–07 and accompanying text.

overlooked consistency across privately owned and publicly owned spaces; by setting forth the important constitutional consistency across media technologies; by articulating clearer limits on government's discretion when government aims to increase access for speech spaces; and by demonstrating the role of "sufficiency" broadly across many First Amendment domains.

The next Part provides necessary background, including a discussion of spaces and of the negative-liberty model. Part I.D.1 provides a detailed interpretive analysis of the practice and precedents reflecting the core architectural principles. It marshals evidence across a range of spaces that should change the way even leading scholars view First Amendment precedent. Finally, Part III discusses normative implications for doctrine and theory, demonstrating that adherence to the principles furthers First Amendment values of democracy and autonomy.

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 within First Amendment thought.[31] With roots in Zechariah Chafee's work in the 1920s, this model rests on descriptive and interpretive assumptions about precedent.[32] 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

31. This outline necessarily simplifies a difficult, complex doctrine. *See, e.g.*, TRIBE, *supra* note 3, at 220 ("[C]onstitutional protection for 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.").

32. *See, e.g.*, Charles L. Barzun, *Politics or Principle? Zechariah Chafee and the Social Interest in Free Speech*, 2007 BYU L. REV. 259, 260 & n.5.

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.[33]

The standard First Amendment model, as evidenced both in casebooks and scholarship, selects as paradigm cases those involving government silencing an offensive or subversive speaker, generally because of speaker's speech content.[34] In some of the cases, government silences a dissenter,[35] or a bigot,[36] or a flag-burner.[37] 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[38] and/or autonomy,[39] the most important principles for doctrine are more

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33. *See, e.g.*, Mark Tushnet, *Renormalizing* Bush v. Gore*: An Anticipatory Intellectual History*, 90 GEO. L.J. 113, 114–16 (2001).

34. *See* Marvin Ammori, *Another Worthy Tradition: How the Free Speech Curriculum Ignores Electronic Media and Distorts Free Speech Doctrine,* 70 MO. L. REV. 59, 97–122 (2005).

35. *E.g.*, *Cohen v. California*, 403 U.S. 15, 16 (1971); *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

36. *E.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

37. *E.g.*, *Texas v. Johnson*, 491 U.S. 397 (1989).

38. Perhaps the classic statement is the work of Alexander Meiklejohn. *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT (1948); *see also* C. EDWIN BAKER, MEDIA, MARKETS, AND DEMOCRACY 129–53 (2002) [hereinafter BAKER, MARKETS] (discussing four categories of democratic theories); ROBERT A. DAHL, ON DEMOCRACY 37–43, 189–91, 196–99 (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, 1350–70 (2009).

39. *See* YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM, 165, 176–211 (2006) [hereinafter BENKLER, WEALTH OF NETWORKS]; THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT (1966); Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 876, 880-84 (1994) ("Autonomy, however, is a protean concept, which means different things to different people . . . ."); 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 Byard Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 NW. U. L. REV. 54, 68–86 (1989)

specific or "middle-level" principles applied by courts and scholars.[40] 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.[41] 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.[42] In Frederick Schauer's words, "the prevailing doctrinal structure embodies a series of clear choices in favor of

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(discussing different theories advanced to underlie freedom of speech); *see also* Yochai Benkler, *Siren Songs and Amish Children: Autonomy, Information, and Law*, 76 N.Y.U. L. REV. 23, 31–40 (2001) [hereinafter Benkler, *Autonomy*].

40. Lillian R. BeVier, *Rehabilitating Public Forum Doctrine: In Defense of Categories*, 1992 SUP. CT. REV. 79, 121–22 [hereinafter BeVier, *Public Forum*] (characterizing these "middle-level questions" as 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, Commentary, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735–36 (1995).

41. For a similar list, see Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 259–61 (1992).

42. *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 40, at 102–12; Kagan, *supra* note 27, 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, *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"); 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) [hereinafter Sullivan, *Political Money*]; ("The norm in political speech is negative liberty: freedom of exchange, against a backdrop of unequal distribution of resources . . . ."); *see also* John Fee, *Speech Discrimination*, 85 B.U. L. REV. 1103, 1120–22 (2005) (discussing scholarship asserting that the central claim of the First Amendment is "anti-discrimination" rather than "consciously promoting the value of speech"); Ronald Dworkin, *Liberty and Pornography*, N.Y. REV. BOOKS, Aug. 15, 1991, at 12, *available at* http://www.nybooks.com/articles/archives/1991/aug15/liberty-and-pornography/ (characterizing freedom of speech as a negative liberty).

negative rights and against positive rights."[43] 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).[44]

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, or Internet access providers to open property to other speakers.[45] Also, the second conception of negative liberty would 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 also they would forbid legislatures from passing laws to supply that access.[46] Such laws would violate the negative liberty of individuals to engage in speech without government interference, however well-meaning. Alongside negative liberty, scholars infer several related corollaries.

The first corollary is a principle of "government distrust," rather than of deference to or trust in government decision-making.[47] 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

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43. 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 . . . .").

44. 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.

45. *E.g.*, *Hudgens v. NLRB*, 424 U.S. 507, 513, 520–21 (1976).

46. *But see PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980).

47. *See* Stone, *Autonomy*, *supra* note 42, at 1171.

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.[48]

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.[49]

Fourth, negative liberty assumes a public/private distinction generally tied to property rights.[50] 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.

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.[51] 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.[52] 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.[53]

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48. *See* Redish & Kaludis, *supra* note 42, at 1108.

49. *See* Kagan, *supra* note 27, at 464–72.

50. *See generally* Lillian BeVier & John Harrison, *The State Action Principle and Its Critics*, 96 VA. L. REV. 1767, 1774–85 (2010).

51. These include campaign finance case *Buckley v. Valeo*, 424 U.S. 1 (1976), newspaper right-to-reply case *Miami Herald Publ'g Co. 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) and *Turner Broad. Sys., Inc. v. FCC* (*Turner II*), 520 U.S. 180 (1997). I discuss most of these cases later in this Article. *See infra* notes 314–320, 414–426, and accompanying text.

52. *See* Redish & Kaludis, *supra* note 42, at 1105–13.

53. *See, e.g.*, *United States v. O'Brien*, 391 U.S. 367, 376–77 (1968) (applying content-neutral test to law likely designed to target content).

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,[54] which requires government to open up particular government-owned spaces, from parks to public streets to spaces outside government buildings.[55] They also include newer speech spaces.[56] 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.[57]

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54. BeVier, *Public Forum*, *supra* note 40, at 113–14; Calvin Massey, *Public Fora, Neutral Governments, and the Prism of Property*, 50 HASTINGS L.J. 309, 313 (1999).

55. *See, e.g.*, BeVier, *Breyer*, *supra* note 42, 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 54, 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 43, at 915–16 (noting the public forum doctrine is "the one significant exception" to a negative-liberty rule); Kathleen M. Sullivan, *Constitutionalizing Women's Equality*, 90 CALIF. 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, 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.").

56. *See, e.g.*, Ammori, *supra* note 34, at 97–122; 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 W. Van Alstyne, *The Möbius Strip of the First Amendment: Perspectives on Red Lion*, 29 S.C. L. REV. 539, 574–75 (1978); 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, 263 (2003) [hereinafter Yoo, *Rise*]. For a justification of the exception, see Lee C. Bollinger, Jr., *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).

57. *See* C. Edwin Baker, *Turner Broadcasting: Content-Based Regulation of Persons and Presses*, 1994 SUP. CT. REV. 57, 99–105 [hereinafter Baker, *Turner*]; Bollinger, *supra* note 56, at 17–26.

Cable television is at least a partial exception.[58] Regulations ensuring access to phone lines are an exception, rarely discussed except to point out the minimal constitutional scrutiny of laws burdening phone companies, despite the phone's importance as a speech medium.[59] 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.[60] 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.[61] In short, "exceptions" to doctrine somehow govern our most important physical and virtual speech spaces.

These exceptions lead to competing models. While not identical,[62] 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.[63] Calvin Massey refers to an inoperative "affirmative theory" and an increasingly operative "negative theory."[64] Lillian BeVier refers to an affirmative "Enhancement Model" and a negative "Distortion Model."[65] Daryl Levinson refers to "civic republican" and "negative liberty" visions.[66] John Fee refers to "speech maximizing" and "anti-discrimination" values.[67]

The "exceptional" models rely not on negative liberty and its corollaries but on exceptional principles—affirmative rights, equalizing

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58. Kagan, *supra* note 27, at 464 (concluding the dissent better conforms to the apparent negative-liberty model).

59. *See* ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM 2 (1983).

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

61. Copyright is also an exception, violating *Buckley*'s anti-redistribution phrase, as it redistributes speech power and silences some for the benefit of others. *See* Tushnet, *supra* note 56, at 35–47.

62. Sullivan classifies a neutrality principle with the more affirmative vision, while Massey and BeVier classify neutrality with negative liberty. *Compare* Sullivan, *Two Concepts*, *supra* note 42, at 146–55, *with* BeVier, *Public Forum*, *supra* note 40, at 102, *and* Massey, *supra* note 54, at 313.

63. Sullivan, *Two Concepts*, *supra* note 42, at 146–63 (discussing these conceptions in light of campaign finance decisions).

64. Massey, *supra* note 54, at 309.

65. Bevier, *Public Forum*, *supra* note 40, at 101–02 (defining an affirmative model as "concerned with how much speech takes place in society and with the overall quality of public debate").

66. Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311, 1363 (2002).

67. Fee, *supra* note 42, at 1107–09, 1113–16.

speech, and 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.[68] Yet the common response to their model is straightforward: 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."[69] One may argue that a law *ought* to be constitutional simply because it *is* constitutional. The is-ought fallacy, while not logically sound, is common in doctrinal analysis.[70] While scholars propose normative defenses for principles

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68. *See, e.g.*, C. EDWIN BAKER, MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS 124–62 (2007) [hereinafter BAKER, OWNERSHIP]; BAKER, MARKETS, *supra* note 38, at 7–62; BENKLER, WEALTH OF NETWORKS, *supra* note 39, at 133–76; ZECHARIAH CHAFEE, JR., GOVERNMENT AND MASS COMMUNICATIONS (1947); OWEN FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER 142-58 (1996); LESSIG, *supra* note 2, at 270-75; CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 53–92 (1993); Baker, *Turner, supra* note 57, at 88; 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, 364–86 (1999); Donald W. Hawthorne & Monroe E. Price, *Rewiring the First Amendment: Meaning, Content and Public Broadcasting*, 12 CARDOZO ARTS & ENT. L.J. 499, 504–10 (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); 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); *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).

69. *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).

70. 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 ed., Oxford Univ. Press 2d ed. 1978) (1739); *see* Volokh, *supra* note 69, at 1102 (noting the persistence of the is-ought fallacy over the millennia).

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.[71] 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.[72]

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.[73] 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 skepticism of the governmental regulation of expression."[74] 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

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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 31, at 278 ("It requires determined interpretive effort to derive a useful set of constitutional principles by which to evaluate regulations of expression.").

71. Massey, *supra* note 54, at 332-33.

72. *See* RABBAN, *supra* note 27; Kagan, *supra* note 27; Kalven, *supra* note 27.

73. *See* Redish & Kaludis, *supra* note 42.

74. *Id.* at 1086–87.

clearly violate the epistemological neutrality that stands at the core of the right of free expression."[75] Indeed, they assert, "[i]t is standard First Amendment thinking that . . . the right of free expression must be implemented on a value-neutral basis."[76] 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."[77] 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.

Many of the arguments against limiting campaign finance expenditures also rest on a "conventional" understanding of First Amendment principles reflecting negative-liberty norms,[78] and argue that some egalitarian arguments against campaign finance would require a "major revision of general First Amendment understandings."[79]

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 Part III.[80] Some of these principles are explicit,

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75. *Id.* at 1087.

76. *Id.* Value-neutrality seems only to require that government *not* act. If government were to act somehow to promote value neutrality, it would likely violate the "conventional principle" against redistribution.

77. Tribe & Goldstein, *supra* note 21, at 2.

78. *See, e.g.*, Sullivan, *Political Money, supra* note 42, at 673 ("Conventional First Amendment norms of individualism, relativism, and antipaternalism preclude any such affirmative equality of influence—not only as an end-state but even as an aspiration.").

79. *Id.* at 675.

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

repeatedly invoked in decisions, while others are more implicit.[81] Though other free speech principles exist,[82] and the government enforcement mechanism always affects constitutionality, we learn much from tracing through and recognizing the significance of a principle—here five—in precedent.

My primary argument in this Article is that these principles run through constitutional law implicitly and should be adopted explicitly by courts deciding questions concerning legislated or judicial access to speech spaces. I will argue, after tracing the principles, that the judiciary should apply these principles doctrinally, rather than applying the traditional "standards of scrutiny" that have increasingly dominated areas of First Amendment doctrine. These principles reflect a substantive, value-laden concern for the availability of speech spaces for all Americans, and largely defer to government attempts to increase the availability of such speech spaces. The precedent demonstrates that these five principles have been core to how Americans experience their First Amendment protections, both throughout our history and today. The precedent also reflects important judicial limitations in government's ability to effectuate these principles, and these principles are designed merely to ensure government does not engage in inappropriate content or viewpoint discrimination. They are generally implicit, just as efficiency concerns have been implicit in property and contracts decisions, and result from incremental, incompletely theorized judicial decisions.[83]

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

Sufficient, required spaces: By judicial fiat, all individuals must have access to some basic, adequate spaces for autonomy and public discourse necessary in a democracy.

Designated, additional spaces: Beyond these judicially required spaces, the government may open additional spaces for speakers, whether those spaces are publicly or privately owned, and whether for all or particular classes of speakers.

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81. In making common law, courts often follow principles that are not explicit in the decisions, but can be identified after the fact. *Cf.* Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487, 491–97 (1980); 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).

82. *See, e.g.*, Kagan, *supra* note 27, at 414–16 (tracing one principle regarding government motive to suppress speech).

83. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 249–53 (7th ed. 2007); John C. Goodman, *An Economic Theory of the Evolution of the Common Law*, 7 J. LEGAL STUD. 393 (1978); George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977).

Diverse and antagonistic sources: Government may craft access to speech spaces to ensure diverse sources of speech are available in those spaces.

National and local spaces: The government may create spaces both for national discourse, to bind a large, heterogeneous nation, and for local discourse, where speakers can address local community concerns.

Universal spaces: The government may ensure that legislatively determined "necessary" speech spaces are extended to *all* Americans, including those in rural and impoverished areas.

These principles all reflect substantive and normative speech values. They 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 spatial constraints and constitutional law.

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.[84] Lessig defines architecture broadly: "the world as I find it, understanding that as I find it, much of this world has been made."[85] 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

84. *See* LESSIG, *supra* note 2, at 120-37; Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 662-65 (1998) [hereinafter Lessig, *New Chicago*].

85. *See* Lessig, *New Chicago*, *supra* note 84, at 663.

other options.[86] The design of spaces, for example, can constrain potential criminals, reducing crime.[87]

Law can shape access to spaces. For example, law can ensure access for members of every race 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.[88]

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;[89] some find it too speech-restrictive and deferential to government to silence individuals,[90] while others find it not deferential enough to government management of its property.[91] All sides seem to find it formalistic and incoherent.[92]

Scholars also debate the relationship between constitutional law and access to virtual spaces. Virtual spaces are central to American discourse and liberty[93] 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

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86. For discussion of varieties of constraints, with sources, including subjective and objective constraints, see Lessig, *New Chicago*, *supra* note 84, at 677–79, and see also sources cited *supra* note 2.

87. *See* Neal Kumar Katyal, *Architecture as Crime Control*, 111 YALE L.J. 1039, 1056–57 (2002).

88. *Cf.* Samuel L. Bray, *Power Rules*, 110 COLUM. L. REV. 1172, 1172 (2010) (discussing "power rules" that structure "underlying relations of power and vulnerability" among private individuals).

89. *See, e.g.*, ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 199 (1995) (observing that the doctrine has "received nearly universal condemnation from commentators").

90. *See id.* at 199–267.

91. Massey, *supra* note 54, at 330-43.

92. *See* POST, *supra* note 89, at 199 (characterizing the doctrine as "a serious obstacle . . . to sensitive First Amendment analysis"); Massey, *supra* note 54, at 330-31; Timothy Zick, *Space, Place, and Speech: The Expressive Topography*, 74 GEO. WASH. L. REV. 439, 457 & nn. 112, 115 (2006).

93. *See* Ammori, *supra* note 34, at 86–91; 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) (noting that Americans live "not only in homes, offices, or enclosed phone booths, but also in Internet ehat [sic] rooms, web sites, and other electronic environments"); Daniel J. Solove, *Identity Theft, Privacy, and the Architecture of Vulnerability*, 54 HASTINGS L.J. 1227, 1241 (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*, WRAP (Sept. 20, 2010, 6:54 PM), http://www.thewrap.com/media/column-post/people-spend-more-12-day-consuming-media-study-finds-21005.

others,[94] Chris Yoo[95] and Laurence Tribe[96] 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, Lawrence 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.[97] Balkin 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.[98] Of course, many believe

94. *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 J.L. & POL'Y FOR INFO. SOC'Y 197, 202-10 (2007).

95. *See* Yoo, *Architectural*, *supra* note 56, at 713; Christopher S. Yoo, *Free Speech and the Myth of the Internet as an Unintermediated Experience*, 78 GEO. WASH. L. REV. 697, 739–50 (2010) [hereinafter Yoo, *Free Speech*]; Yoo, *Rise*, *supra* note 56, at 254.

96. *See* Tribe & Goldstein, *supra* note 21, at 2; 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, ex parte, CS Dkt. No. 98-120, Nov. 24, 2003, http://fjallfoss.fcc.gov/ecfs/document/view?id=6515291211; Transcript of Oral Argument at 34–35, *United States v. Chesapeake & Potomac Tel. Co. of Va.*, 116 S. Ct. 1036 (1995) (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) (No. 00-1222) [hereinafter TWE-Fox Brief] (brief by Laurence Tribe).

97. Baker has devoted multiple books to analyzing how media architectures favoring multiple speakers, rather than a few powerful ones, promote substantive democratic and individual autonomy goals. *See, e.g.*, BAKER, MARKETS, *supra* note 38, at 125–28; BAKER, OWNERSHIP, *supra* note 68, at 54–87. 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, WEALTH OF NETWORKS, *supra* note 39, at 176–212; Benkler, *supra* note 68, at 381–86. Lessig has discussed government discretion to adopt "architectures of freedom" or "architectures of control." *See* LESSIG, *supra* note 2, 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 68, at 142-58; Owen M. 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 68, at 2; *see also* TRIBE, *supra* note 3, 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).

98. *See* Balkin, *supra* note 68, at 942.

their arguments conflict with "core" First Amendment purposes and lack grounding in precedent.[99]

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,[100] particularly for individual rights such as freedom of speech.[101]

Moreover, even assuming judicial supremacy,[102] 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.[103] Decisions that uphold legislation can clarify "constitutional" law for the First Amendment as they can for the Commerce Clause.[104] All passable judicial tests,[105] 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 pass them).[106] Those

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99. *See, e.g.*, Gregory P. Magarian, *Regulating Political Parties under a "Public Rights" First Amendment*, 44 WM. & MARY L. REV. 1939, 1943 (2003) (criticizing the fact that the Court "treats the freedom of expression . . . as private, negative rights intended to shield individual autonomy against government regulation").

100. *See, e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 375 (2007) ("[T]raditional scholarship has tended to confuse the Constitution with judicial decisionmaking . . . .").

101. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 105–16 (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 . . . .").

102. *Cf.* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 1 (1999).

103. *Compare Virginia v. Black*, 538 U.S. 343, 358–61 (2003), *with R.A.V. v. City of St. Paul*, 505 U.S. 377, 391–94 (1992).

104. *See Gonzales v. Raich*, 545 U.S. 1, 9 (2005).

105. 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, 805–13 (2006).

106. *See, e.g.*, *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 799–800, 806 (1985) (noting the requirement of viewpoint-neutrality even in nonpublic forums).

requirements and discretion both constitute aspects of constitutional law. While some judicial decisions can *require* the availability of some spaces for speech—parks or 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.[107] Legislatures have guidance based on judicial decisions, as litigants often bring First Amendment challenges to "information policy" and common carrier policies.[108] The Supreme Court decides some of these cases, but other federal appellate courts also provide important guidance on these constitutional issues.[109] Other times, the long-time acceptability of certain rules may reflect a "constitutional practice" suggesting constitutionality.[110]

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.[111] As a result, permissible legislative actions—including those expanding the availability of speech spaces—may themselves reflect constitutional norms.

B. Some Usual Distinctions Discarded, New Distinctions Uncovered

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.

Overlooked commonalities exist between spaces generally believed to have very different doctrinal frameworks. These include private and public spaces, physical and virtual spaces, varying virtual spaces that use differing technologies, and certain spaces governed formally by different doctrinal categories that, in substance, lead to identical outcomes.

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107. *Cf.* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 869 (1999).

108. *See* Marvin Ammori, *Beyond Content Neutrality: Understanding Content-Based Promotion of Democratic Speech*, 61 FED. COMM. L.J. 273, 288–91 (2009) [hereinafter Ammori, *Democratic Content*]; Ammori, *supra* note 34, at 92–122.

109. 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.

110. *See, e.g.*, *Eldred v. Ashcroft*, 537 U.S. 186, 201–04 (2003).

111. *See infra* note 306 and accompanying text (discussing rights under-inclusion and remedies).

First, the same principles *functionally*, though not formally, apply for privately owned and publicly owned property.[112] The same apply for designated public forums (publicly owned) and access rules to shopping malls (privately owned). The same apply for traditional public forums (publicly owned) and equivalent forums in privately owned company towns (privately owned). The same apply to limited public forum doctrines (publicly owned) and access rules to private communications infrastructure (privately owned).[113] The same apply for postal carriage of newspapers (virtual, public) and cable carriage of broadcast signals (virtual, private).

Second, across physical and virtual spaces, functionally similar principles apply. They apply, for example, for limited public forums (physical) and postal systems and telecommunications access rules (virtual).

Third, we need not divide up doctrine artificially based on "*technology*" or "medium." This conclusion will likely please, though surprise, many scholars. Across spaces, both physical and virtual, from central parks to broadcast 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, the functional equivalence often reflects deep similarities among different doctrinal areas, such as limited public forum, subsidized speech, and telecom access rules. These doctrines have prompted deep scholarly and judicial confusion, failing to clarify analysis,[114] so recognizing their commonalities may improve judicial reasoning.[115]

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112. *Cf. Developments in the Law—State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248, 1303–04 (2010).

113. *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).

114. *See* Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 151–52 (1996) (noting the "perplexing territory" full of "difficult constitutional questions"); 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").

115. *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); *see also* Ammori, *Democratic Content*, *supra* note 108, 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 CALIF. L. REV. 1687, 1741–42 (1997).

In addition to these overlooked commonalities, we can add a few distinctions that are sometimes overlooked. These include the distinction between constitutionality and optimality and the distinction between speakers and spaces.

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.[116] 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. Far too often, scholars jump from whether a law is constitutionally permissible under the First Amendment to whether it is constitutionally required, without appreciating the importance of constitutional permissibility.[117]

Second, judges implicitly distinguish between speakers and spaces. That is, a cable system could be a *space* for others to speak, or it could itself be an extension of a *speaker*. A shopping mall could be a space for all speakers or an extension of the mall owner's speech. Judicial cases and academic articles have touched on the question of distinguishing digital spaces from digital speakers, often using the terminology of conduits (for spaces) and editors (for speakers).[118] When government regulates what it considers to be a privately owned *space* for speech, a property owner may object that government is censoring her 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.[119] Proponents of the regulation,

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116. *See, e.g.*, Schauer, *Hohfeld's*, *supra* note 42, at 932.

117. It is perhaps for this reason that academics tend to emphasize the cases ruling that the First Amendment does not require speakers' access to shopping malls, while de-emphasizing cases ruling that the First Amendment *permits legislative action* ensuring such access.

118. *See, e.g.*, *Denver Area*, 518 U.S. at 739 (plurality opinion) (contrasting editors and conduits such as common carriers); Benjamin, *supra* note 60, at 1674–86, 1687 & n.39; Angela J. Campbell, *Publish or Carriage: Approaches to Analyzing the First Amendment Rights of Telephone Companies*, 70 N.C. L. REV. 1071, 1144–49 (1992); Philip J. Weiser, *Toward a Next Generation Regulatory Strategy*, 35 LOY. U. CHI. L.J. 41, 64–65 (2003) (arguing that the FCC's classification of Internet service providers should affect First Amendment status of the providers as speakers or conduits).

119. *See, e.g.*, *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 86–88 (1980).

however, would 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 actions of the space's owner, the space's 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.[120] 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.[121] Scholars like Chris Yoo and Laurence Tribe suggest these companies are, instead, speakers.[122]

C. Five Architectural Principles

1. SUFFICIENT, JUDICIALLY REQUIRED SPACES

Speech doctrine ensures that—as a matter of judicial mandate—all individuals have access to some basic, minimal spaces for speech. Such spaces support both autonomy and minimal spaces for discourse. These include spaces from homes to public parks. According to the negative-liberty model, these judicially required spaces are "exceptions" or outliers. These spaces are not exceptional in principle, being governed by consistent principles, nor in practice, as we spend a considerable amount of time, often with speech, in our homes and in public paths.

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120. *See id.* at 87–88 (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 42, at 1127–28 (discussing this issue as a "gatekeeper dichotomy"). Indeed, at one point in our history, printers acted like common carriers, not speakers in their own right. *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 & nn.16–19, 27 (1994) (discussing printers as speakers and conduits).

121. *See* Preserving the Open Internet, *supra* note 15, at 17,983. 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. Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Calif.*, 475 U.S. 1, 9 (1986).

122. *See* Tribe & Goldstein, *supra* note 21, at 3–4; Yoo, *Architectural*, *supra* note 56, at 714–15.

a. Spaces for autonomy

To ensure spaces for individual autonomy in a democracy, the judiciary has carved out a space for "special respect," namely the family home.[123]

Standard First Amendment rules do not apply within homes. Government has less power to determine content within homes, while it can suppress unwanted outsider speech more easily at their doors.[124]

Some content is protected in the home and nowhere else. In *Stanley v. Georgia*,[125] the Court held that a state cannot prohibit the possession of obscene material found in someone's home[126]—though "obscene" speech receives "no" protection in *other* spaces.[127] The Court held that "a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."[128]

While government can often regulate speech by content-neutral means, it often cannot regulate speech this way when projected from private homes.[129] In *City of Ladue v. Gilleo*,[130] the Court struck down a law regulating lawn signs; the concurrence noted that the Court did not even bother to apply a traditional doctrinal test.[131]

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,[132] radio broadcasts,[133]

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123. *City of Ladue v. Gilleo*, 512 U.S. 43, 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 Inviolate Home: Housing Exceptionalism in the Fourth Amendment*, 95 CORNELL L. REV. 905, 913 (2010). The rights of homeless people have been subject to debate. *See, e.g.*, David H. Steinberg, Note, *Constructing Homes for the Homeless? Searching for a Fourth Amendment Standard*, 41 DUKE L.J. 1508, 1536–40 (1992).

124. *See* Fee, *supra* note 42, at 1109, 1164–65 (identifying a zone of protection where speech rights "cannot be reduced, whether or not the government restricts all speech equally").

125. 394 U.S. 557 (1969).

126. *Id.* at 568.

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

128. *Stanley*, 394 U.S. at 565; *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, 362 (2010). *But see Osborne v. Ohio*, 495 U.S. 103 (1990) (upholding prosecution for actual (not virtual) child pornography).

129. *City of Ladue v. Gilleo*, 512 U.S. 43, 58 (1994).

130. 512 U.S. 43 (1994).

131. *Id.* at 59–60 (O'Connor, J., concurring).

132. *E.g.*, *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 737–38 (1970).

133. *FCC v. Pacifica Found.*, 438 U.S. 726, 748–49 (1978).

picketing in front of the home,[134] and sound trucks.[135] Government can even empower citizens to turn away door-to-door advocates by posting a notice in their windows.[136] 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 at courthouses decorated with the phrase "Fuck the Draft."[137]

These supposed "exceptions" for the home point towards the same principle: 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.[138]

b. Spaces for discourse

All citizens also must have access to basic minimal spaces for speech and discourse in public spaces where others gather and converse, and this access is similarly backed by judicial mandate. 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," according to the negative-liberty model. These supposedly exceptional spaces include

134. *Frisby v. Schultz*, 487 U.S. 474, 483–84 (1988).

135. *Kovacs v. Cooper*, 336 U.S. 77, 86–87 (1949).

136. *Martin v. City of Struthers*, 319 U.S. 141, 147–48 (1943).

137. *See, e.g.*, *Texas v. Johnson*, 491 U.S. 397, 414–16 (1989); *Cohen v. California*, 403 U.S. 15, 21–22 (1971).

138. *See* POST, *supra* note 89, at 1–5; *see also* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 24–25 (1996); JOHN RAWLS, POLITICAL LIBERALISM 257–88 (expanded ed. 2005); Michael Adler, Note, *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, 1315 (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 JOSHUA COHEN, *Deliberation and Democratic Legitimacy*, *in* PHILOSOPHY, POLITICS, DEMOCRACY: SELECTED ESSAYS 16, 25–28 (2009); ADAM SWIFT, POLITICAL PHILOSOPHY: A BEGINNER'S GUIDE FOR STUDENTS AND POLITICIANS 191–94 (2006); Post, *supra* note 39, at 1115–23.

public parks, streets, and squares; they are significant both in terms of the population using them and the spatial area they cover.[139]

Unlike most other spaces, traditional public forums generally cannot be closed off entirely to public speech. In *Hague v. Committee for Industrial Organization*,[140] and *Schneider v. New Jersey*,[141] both decided in 1939, the Court struck down ordinances forbidding pamphleteering on streets or public places.[142] 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 of communication.*"[143] The ample-channels requirement, which is not found in other intermediate speech tests,[144] is concerned not with censorship but with the architectural concern of ensuring sufficient speech spaces.

Tellingly, a principle of minimal discursive spaces is not limited to publicly owned property. In another "outlier" reflecting the same principle, the Court required access even for privately owned property—to the same exact spaces available in publicly owned towns—when such spaces would not have been otherwise available. In *Marsh v. Alabama*,[145] decided in 1946, the Supreme Court concluded that streets in a company town must be treated like traditional public forums.[146] Company towns are now unusual; more common are sprawling "campuses" for companies like Google and Facebook with private chefs, massages, and busing services.[147] Company towns once dotted our nation and housed millions. There were over 2,500 company towns at one point, including Hershey in Pennsylvania and Pullman in Illinois.[148] In *Marsh*, the Court even noted that, at the time, "[m]any

139. All public streets, including residential ones, are traditional public forums. *Frisby*, 487 U.S. at 481.

140. 307 U.S. 496 (1939).

141. 308 U.S. 147 (1939).

142. *Hague*, 307 U.S. at 501, 516; *Schneider*, 308 U.S. at 155–57, 162-65 (striking down four state ordinances).

143. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (emphasis added).

144. *See, e.g.*, *Cent. Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564 (1980) (enunciating constitutional test for commercial speech); *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (enunciating constitutional test for content-neutral restrictions on symbolic speech).

145. 326 U.S. 501 (1946).

146. *Id.* at 506.

147. *See, e.g.*, Miguel Helft, *Google's Buses Help Its Workers Beat the Rush*, N.Y. TIMES, Mar. 10, 2007.

148. HARDY GREEN, THE COMPANY TOWN: THE INDUSTRIAL EDENS AND SATANIC MILLS THAT SHAPED THE AMERICAN ECONOMY 3–4 (2010).

people in the United States live in company-owned towns," including half of all miners in the coal industry.[149]

Marsh is seen as an extreme outlier in the negative-liberty model, as it affirmatively provides spaces to individuals while interfering with a private company's right to manage its own property. But *Marsh* disagrees with the negative-liberty model in the same exact way that public property does, demonstrating a consistent principle about speech spaces: in any town, private or public, the streets and parks *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 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 piggyback 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, and content-neutral requirements in opening additional spaces will play an essentially affirmative (not negative) role.[150] As we will see in the next subsection, whenever government makes available spaces that are *not* mandatory, it must do so in an evenhanded way, without discriminating against particular speakers or viewpoints. If government believes that *some* speakers need access to

149. *Marsh*, 326 U.S. at 508 & n.5.

150. *See* Fee, *supra* note 42, at 1159–69.

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; courts can free ride on legislative decisions through the content-neutral doctrine for designated spaces. To do so, they 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."[151] In terms of sufficient spaces for speech, congressional spaces are as necessary for democracy as mandatory protection for the homes of Americans.

Similarly, the traditional public forum doctrine extends to the spaces outside federal and state capitol buildings[152] and courthouses.[153] 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."[154] 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 exercise power.

2. ADDITIONAL, DESIGNATED, OR DISCRETIONARY SPACES

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

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151. U.S. CONST. art. I, § 6.

152. *See, e.g.*, *Pouillon v. City of Owosso*, 206 F.3d 711, 717 (6th Cir. 2000) (holding the U.S. Capitol and state capitols are proper places for demonstrations and citing numerous precedent).

153. *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, 550–51 (1965).

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

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.

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.[155]

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.[156] 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.[157] Governments have designated as speech forums: municipal theaters, school board meetings, or other publicly owned spaces.[158] Analogously, if

155. 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. 113 (1973)] short-circuited the democratic deliberation that is the most reliable method of deciding questions of competing values.").

156. *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*].

157. *See Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2984 n.11 (2010).

158. *See, e.g.*, *City of Madison Joint Sch. Dist. No. 8 v. Wis. Emp't Relations Comm'n*, 429 U.S. 167, 174 & n.6 (1976) (school board meetings); *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975) (municipal auditorium and city-leased theater).

government opens newspaper dispensers on public streets to some papers, it must make them available to other papers, regardless of content.[159]

Similarly, *limited forum* doctrine enables government to designate a forum not for *all*, but for "certain speakers, or for the discussion of certain subjects."[160] A limited public forum can be either a "place" or a (virtual) "channel of communication";[161] it can even be "a metaphysical" rather than a "spatial or geographic" space, such as a fund of money.[162] Limited public forums include, among others, university facilities for student groups[163] or open areas of school campuses.[164] The applicable doctrinal test seems not to require subject-matter (or "content") neutrality in selecting speakers,[165] but does require viewpoint-neutrality.[166] 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.[167]

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.[168] 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.[169] But in 1980, in *PruneYard Shopping Center*

159. *Cf. City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417–19 (1993).

160. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). This doctrine, however, is confusing. *See* Marc Rohr, *The Ongoing Mystery of the Limited Public Forum*, 33 NOVA L. REV. 299, 300 & n.3 (2009); Note, *Middle Forum*, *supra* note 156, at 2154.

161. *Cornelius*, 473 U.S. at 802.

162. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995).

163. *See Widmar v. Vincent*, 454 U.S. 263 (1981).

164. *Justice for All v. Faulkner*, 410 F.3d 760, 769–70 (5th Cir. 2005); Rohr, *supra* note 160, at 336–37.

165. The relationship between speaker-discrimination and content-discrimination is uncertain. *See* Fee, *supra* note 42, at 1129–30. *Compare Citizens United v. FEC*, 130 S. Ct. 876, 899 (2010), *with id.* at 945 (Stevens, J., dissenting).

166. 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 160, at 319–22.

167. *See* Ammori, *Democratic Content*, *supra* note 108, at 286–300.

168. *See, e.g.*, *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980).

169. *See Hudgens v. NLRB*, 424 U.S. 507, 520–21 (1976).

v. Robins,[170] the Supreme Court unanimously held that states may adopt legislation that opens up private shopping malls for speech, rejecting the mall's speech claim.[171]

b. Virtual spaces: publicly and privately owned

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

(I) PUBLICLY OWNED POSTAL NETWORKS

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.[172] 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.[173] Constitutionally discretionary legislative rules, regarding access to postal spaces, protected and promoted newspapers' speech even more than judicial doctrine for most of our history.[174]

Since before the Constitution and well into the twentieth century, the "post office and press working together," were "intertwined" as one "major communication system."[175] 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.[176] For decades, the postal network's primary function was disseminating newspapers, rather than letters; government taxed letters heavily to subsidize

170. 447 U.S. 74 (1980).

171. *See id.* at 79–80, 85–88 (treating the California constitution as a state statute); *see also State v. Schmid*, 423 A.2d 615, 628–30 (N.J. 1980) (holding that state law required access for speakers on private college campuses), *appeal dismissed sub nom. Princeton Univ. v. Schmid*, 455 U.S. 100 (1982).

172. *See, e.g.*, RICHARD B. KIELBOWICZ, NEWS IN THE MAIL: THE PRESS, POST OFFICE, AND PUBLIC INFORMATION, 1700–1860S (1989); STARR, *supra* note 14, at 87–89; *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).

173. *See* KIELBOWICZ, *supra* note 172, at 2.

174. *See* STARR, *supra* note 14, at 267–68; Baker, *Turner*, *supra* note 57, 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).

175. KIELBOWICZ, *supra* note 172, at xi, 1.

176. *Id.* at 1.

newspapers.[177] Many early publishers were postmasters,[178] while postmasters often also served as unofficial subscription agents for newspapers, encouraging subscription to local papers, based both on custom and postal laws.[179] The names of newspapers still reflect this relationship: the "evening post" or the "daily mail."[180] In the 1980s, Justice William Brennan called the postal service "a vital national medium of expression."[181]

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.[182] Congress used the mailing system deliberately to promote publications discussing news and affairs.[183] 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."[184] Genres and publications died and lived based on postal policy.[185]

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.[186] Indeed, Congress had to designate the forum in the first place; the Constitution does not require government to make postal spaces available,[187] and the Court has determined postal spaces are nonpublic forums unless designated otherwise.[188] Moreover, Congress's requirement of nondiscrimination specifically reversed pre-Constitution practice, which consisted of

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177. *See id.* at 43; Kelly B. Olds, *The Challenge to the U.S. Postal Monopoly, 1839–1851*, 15 CATO J. 1, 5–7 (1995).

178. *See* KIELBOWICZ, *supra* note 172, at 13; STARR, *supra* note 14, at 55–56.

179. *See* KIELBOWICZ, *supra* note 172, at 43, 103.

180. *See id.* at 16.

181. *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 138 (1981) (Brennan, J., concurring)

182. *See* KIELBOWICZ, *supra* note 172, at 2.

183. *See id.* at 1, 3.

184. *Id.* at 2.

185. *See id.* at 8 n.4, 129.

186. *See, e.g.*, *Lamont v. Postmaster Gen.*, 381 U.S. 301, 305–07 (1965) (holding government could not require citizens to take the affirmative step of requesting the post office to deliver to them mail from certain political sources); *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 153–59 (1946) (holding that government could not make value judgments about which literature will be given favorable second class rates). Earlier decisions were less enlightened. *See* RABBAN, *supra* note 27, at 27–32; *see also* KIELBOWICZ, *supra* note 172, at 121–29, 133–34; STARR, *supra* note 14, at 161. Magazines also received privileges in the late 1800s, as did some nonprofits. *Id.* at 261; Kielbowicz & Lawson, *supra* note 172, at 348, 352, 372-73.

187. *See* U.S. CONST. art. I, § 8, cl. 7 (empowering Congress "[t]o establish Post Offices and post Roads").

188. *See U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 128–30 (1981).

postmasters denying mail access to competing papers, something that Benjamin Franklin both experienced and then (when postmaster) exploited.[189] 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.[190]

To this day, political magazines still rely on low postal rates, prompting controversy over proposed rate hikes,[191] and the postal network's largest corporate client is Netflix, which distributes speech (films and shows) through both the Internet and the postal service.[192] 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.[193] Neither space is a traditional public forum, while both are open merely by legislative policy making.

(II) PRIVATELY OWNED NETWORKS

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.[194] By law, a phone company is a common carrier, accepting all callers for a fee. A newspaper is not and need not accept a speaker's money to carry her speech.

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189. *See* KIELBOWICZ, *supra* note 172, at 16, 19.

190. *See id.* at 23–24, 32. There were still some abuses, nonetheless, mainly by Federalists. *Id.* at 40–42.

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

192. Ethan Epstein, *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/.

193. Interview with Michael Drobac, Dir. of Gov't Relations, Netflix, in Las Vegas, Nev. (Jan. 11, 2011).

194. Common carrier rules require a company to serve all comers on terms and prices that do not discriminate among similarly situated users. *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 641–42 (D.C. Cir. 1976); *see* Thomas B. Nachbar, *The Public Network*, 17 COMMLAW CONSPECTUS 67, 76–77 (2008).

(III) 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.[195]

The now forgotten telegraph was "the first national medium of mass communication" after the Post Office.[196] 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."[197] But the telegraph was left to the private sector without any access rules.[198] This private telegraph industry relied on, and overlapped with, the newspaper industry; telegraph-use was so expensive that its customers were limited to the press, not individuals.[199] Indeed, local reporters were often local telegraph operators.[200]

A bilateral monopoly developed in news and distribution. The telegraph industry moved from more than fifty companies in 1851 to only one by 1866—Western Union—partly through mergers.[201] 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.[202] 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.[203] The AP also had exclusive deals with *newspapers*, so it could lock out other news services and other telegraph companies.[204]

This bilateral monopoly was an architectural result that many would deem undesirable for a democracy. Many believe it had the power to swing deliberately the contested 1876 election for Rutherford

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195. STARR, *supra* note 14, at 154.

196. *Id.* at 178.

197. *Id.* at 163.

198. *See id.* at 163–65 (asserting this was mainly for fiscal reasons).

199. *Id.* at 177.

200. *Id.* at 185 (discussing the Associated Press and Western Union).

201. *Id.* at 166, 173.

202. *Id.* at 175. I refer to predecessor organizations, including the New York Associated Press, simply as the AP.

203. *Id.* at 174–75.

204. *Id.* at 185. There was no federal antitrust law; the Sherman Antitrust Act passed in 1890, decades later.

B. Hayes, an outcome that ended Reconstruction.[205] But as discussed earlier, according to the negative-liberty 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.[206]

(IV) ACCESS TO CABLE SYSTEMS[207]

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.[208]

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.[209] Upheld generally by the D.C. Circuit,[210] 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

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205. *E.g.*, TIM WU, THE MASTER SWITCH: THE RISE AND FALL OF INFORMATION EMPIRES 22-25 (2010).

206. STARR, *supra* note 14, at 188.

207. 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 360–78 (2005).

208. *See Time Warner Entm't Co. v. FCC*, 93 F.3d 957, 968 (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).

209. 47 U.S.C. §§ 531, 541 (2006).

210. *Time Warner*, 93 F.3d at 971–73.

channels *should* be treated as designated public forums, even though the spaces are on privately owned cable systems.[211]

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.[212]

(V) 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 companies.[213] 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.

(VI) 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.[214]

(VII) THE PHONE SYSTEM

Beyond indecency decisions,[215] 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 receive 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."[216]

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211. *Denver Area*, 518 U.S. at 791–92 (Kennedy, J., concurring in part and dissenting in part).

212. *Turner II*, 520 U.S. 180, 189, 224–25 (1997); *see Turner I*, 512 U.S. 622, 661–62 (1994).

213. *See Nat'l Cable & Telecomms. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 330–31 (2002).

214. *See Time Warner*, 93 F.3d at 975–76.

215. *See, e.g.*, *Sable Commc'ns of Cal., Inc. v. FCC,* 492 U.S. 115, 129–31 (1989).

216. *See, e.g.*, *Citizens United v. FEC*, 130 S. Ct. 876, 943–44 (2010).

Since 1876, phone service has been at least as central to American speech as pamphleteering.[217] 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.[218] Further, for the past two decades, phone companies have consistently asserted First Amendment claims against regulation and architecting,[219] often with arguments crafted by leading constitutional scholars.[220]

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.[221] Later, government designated *mobile* phone spaces, extending the common carrier rule to mobile phone calling.[222] As a result, important speech spaces are, and long have been, designated openly as forums for virtual speech.

(VIII) ACCESS TO THE INTERNET

Despite the mythology that government never "regulated" the Internet,[223] 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. ACLU*,[224] that

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217. *See, e.g.*, Ammori, *supra* note 34, at 61.

218. Indeed, for decades, AT&T was the world's largest company. *See Ill. Bell Tel. Co. v. FCC*, 740 F.2d 465, 468 (7th Cir. 1984); PETER W. HUBER ET AL., FEDERAL TELECOMMUNICATIONS LAW 16–17, 798–99 (2d ed. 1999); *see also* Baker, *Turner*, *supra* note 57, at 94–99 (discussing telephone regulation in the context of free speech doctrine).

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

220. *See, e.g.*, sources cited *supra* note 96; *see also Chesapeake & Potomac Tel. Co. v. United States*, 42 F.3d 181, 190–203 (4th Cir. 1994), *vacated and remanded*, 516 U.S. 415 (1996); Service Rules for the 698–746,747–762 and 777–792 MHz Bands, 22 FCC Rcd. 15,289, 15,369 (2007) [hereinafter 700 MHz].

221. *See, e.g.*, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 404 n.2 (1999) (discussing Act of June 18, 1910, ch. 309, § 7, 36 Stat. 544–545).

222. 47 U.S.C. § 332(c) (2006).

223. *See, e.g.*, Kevin Werbach, *The Federal Computer Commission*, 84 N.C. L. REV. 1, 3–5, 10 (2005).

224. 521 U.S. 844 (1997).

decision struck down a sweeping indecency law, dealing with a classic "censorship" issue.[225] *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."[226] 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.[227] At the same time, even highly sophisticated speech scholars like Professor 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.[228] If anything, Professor Redish should argue the opposite: the Internet demonstrates the speech benefits of access rules.[229]

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

(IX) ACCESS TO BROADCAST SPACES

Broadcasters have been subject to several access rules, some of which have been controversial, while others are generally accepted. In the more controversial *Red Lion Broadcasting Co. v. FCC*[230] decision, the Court upheld access for personally attacked individuals.[231] In another decision, the Supreme Court upheld an FCC rule designating

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225. *Id.* at 870–83.

226. *Id.* at 870 (emphasis added).

227. *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.").

228. *See* Redish & Kaludis, *supra* note 42, at 1084, 1130–31.

229. 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 to the Internet over Wireline Facilities, 20 FCC Rcd. 14,853, 14,855–57 (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* Preserving the Open Internet, *supra* note 15, at 17,925–27.

230. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969).

231. *Id.* at 375.

"reasonable access" to broadcast spaces for federal candidates.[232] 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."[233]

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.[234] 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* 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.[235] In often-quoted 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."[236] Indeed, the Court has stated that a "basic tenet" of our communications policy is faith in this assumption.[237] Judge Learned Hand has declared that we have "staked" our nation on this basic tenet and that the 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."[238] In the 1990s, in evaluating cable television regulations, the Supreme Court invoked the "basic tenet" in holding that "assuring that the public has access to a multiplicity of information

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232. *CBS, Inc. v. FCC*, 453 U.S. 367, 394–96 (1981).

233. *Id.* at 396–97.

234. *See supra* notes 27, 42, and 68.

235. *See, e.g.*, *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 797–802 (1978).

236. *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

237. *Turner I*, 512 U.S. 622, 663 (1994) (quoting *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972)) (internal quotation marks omitted).

238. *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).

sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment."[239]

This "basic tenet" is a tenet not of censorship. It is a tenet of *architectural design*.

In permitting government to pursue a 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 their success in other speech areas.[240] 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.

a. 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-nineteenth century, rather than just the postmaster's preferred newspapers.[241] 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.[242] Compared to the lack of an access rule, these rules enable more diverse sources speaking on the space.[243]

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239. *Turner I*, 512 U.S. at 663.

240. *See, e.g.*, sources cited *supra* note 3.

241. Until the 1880s and 1890s, for example, nearly all newspapers were independent, not chain owned, and larger cities had many competitive dailies. *See* BENKLER, WEALTH OF NETWORKS, *supra* note 39, at 187–90; STARR, *supra* note 14, at 252.

242. *See Turner I*, 512 U.S. at 663–68; *Satellite Broad. & Commc'ns Ass'n v. FCC*, 275 F.3d 337, 351 (4th Cir. 2001); *Time Warner Entm't Co. v. FCC*, 93 F.3d 957, 968 (D.C. Cir. 1996); The Commissions Cable Horizontal & Vertical Ownership Limits, 20 FCC Rcd. 9374, 9376 (2005).

243. There is a debate over whether diverse sources lead to diverse views. *See, e.g.*, BENKLER, WEALTH OF NETWORKS, *supra* note 39, at 205–11; 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.*, *Turner I*, 512 U.S. at 663; *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 797–802 (1978); *Associated Press*, 52 F. Supp. at 372.

b. 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,[244] and companies often assert such limits abridge their free speech rights to buy more outlets to speak with more people.[245]

That is, ownership limits 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* for over eight decades and the Supreme Court suggested one of those limits furthered, rather than impinged on, First Amendment rights.[246] Congress and the FCC have also imposed ownership limits on *cable* television. With one exception,[247] appellate courts have rejected First Amendment challenges to these limits.[248] Imposing satellite television ownership limits, the FCC has limited how much spectrum a satellite provider can buy at auction[249] and blocked a merger of the two dominant satellite television providers, based partly on the concern for ensuring diverse speech sources.[250]

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[251] to reduce the likelihood of one company dominating speech. In 1913, AT&T, then a near-monopoly phone

244. *See Prometheus Radio Project v. FCC*, 373 F.3d 372, 401–02 (3d Cir. 2004) (holding this burden does not violate the First Amendment).

245. *See, e.g.*, TWE-Fox Brief, *supra* note 96, at 11–16.

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

247. *Time Warner,* 240 F.3d at 1129–33 (D.C. Cir. 2001) (invalidating FCC's selected ownership limits for lack of substantial evidence under the *Turner* test).

248. *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).

249. *See* Policies and Rules for the Direct Broadcast Satellite Service, 13 FCC Rcd. 6907, 6927–30 (1998).

250. *See* EchoStar Communications Corporation, 17 FCC Rcd. 20,559, 20,562-63, 20,575 (2002).

251. *See* Dill-White Radio Act, ch. 169, § 17, 44 Stat. 1162, 1169–70 (1927) (repealed 1934); HUBER, *supra* note 218, at 20.

provider, agreed to divest its telegraph lines.[252] 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.[253] For decades, their lawyers raised First Amendment objections to such rules.[254] The long-distance company also could not offer "electronic publishing" services in the years following divestiture.[255] 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."[256]

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.[257]

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.[258] 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.

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

253. *See United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 189–90 (1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

254. *See, e.g.*, *BellSouth Corp. v. FCC*, 144 F.3d 58, 67–68 (D.C. Cir. 1998).

255. *Am. Tel. & Tel. Co.*, 552 F. Supp. at 180–86.

256. *Id.* at 183, 185.

257. Ironically, as noted, scholars often argue that access rules may be unnecessary because of the Internet. *See, e.g.*, Redish & Kaludis, *supra* note 42, at 1084–85. But the Internet *itself* relies on access rules.

258. *See, e.g.*, DAHL, *supra* note 38, at 93–95, 106.

a. 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.[259] 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*.[260] Second, coupled with exchange, the government invested heavily in postal roads to the most remote reaches of our nation,[261] binding the nation in shared speech.[262]

b. 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.[263] 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.

Broadcasting policy similarly aimed to promote localism.[264] Broadcast television licenses were assigned to locations with the primary goal of ensuring at least one local outlet for even small communities.[265] The FCC also encouraged stations to cover matters of local concern.[266] The FCC adopted—or relaxed—a range of broadcast ownership limits in an effort to increase the amount (or diversity) of

259. *See, e.g.*, STARR, *supra* note 14, at 89–92; KIELBOWICZ, *supra* note 172, at 34–35.

260. For a discussion of revolutionary newspapers, see ERIC BURNS, INFAMOUS SCRIBBLERS: THE FOUNDING FATHERS AND THE ROWDY BEGINNINGS OF AMERICAN JOURNALISM *passim* (2006).

261. *See, e.g.*, KIELBOWICZ, *supra* note 172, at 46.

262. *See* BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM 37–46 (1991) (discussing nationhood and a common literature); LESSIG, *supra* note 2, at 291–93; CASS R. SUNSTEIN, REPUBLIC.COM 2.0, at 6 (2007).

263. *See* KIELBOWICZ, *supra* note 172, at 84.

264. For a recent analysis with additional examples, see Akilah N. Folami, *Deliberative Democracy on Air: Reinvigorate Localism—Resuscitate Radio's Subversive Past*, 63 FED. COMM. L.J. 141, 151–157 (2010).

265. *See Fort Harrison Telecasting Corp. v. FCC*, 324 F.2d 379, 383 (D.C. Cir. 1963); *see also* Note, *The Darkened Channels: UHF Television and the FCC*, 75 HARV. L. REV. 1578, 1581 (1962).

266. *See* Folami, *supra* note 264, at 154–57.

local news coverage.[267] 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.[268] Congress effectively required national satellite broadcasters also to carry local broadcasters, partly for this reason.[269]

Earlier, with AM radio, government sought to mix the availability of local and national speakers. AM radio has been around since before the 1920s, while FM radio did not match AM's popularity until the 1980s.[270] In 1928, under General Order 40, the FCC divided up licenses into those serving local, regional, and (by night) national areas.[271] 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.[272] Long-distance calls used to be far more expensive than calling a neighbor.[273]

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.

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 Americans' 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, crisscrossing the nation with postal

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267. *See, e.g.*, *Prometheus Radio Project v. FCC*, 373 F.3d 372, 398–99 (3d Cir. 2004).

268. *See, e.g.*, *Turner II*, 520 U.S. 180, 189–90 (1997); *Turner I*, 512 U.S. 622, 648–49 (1994).

269. Congress tied the satellite rules to a compulsory copyright license subsidy. *Satellite Broad. & Commc'ns Ass'n v. FCC*, 275 F.3d 337, 348–49 (4th Cir. 2001).

270. *See* WU, *supra* note 205, at 126, 133.

271. *See* 1927–1933 F.R.C. ANN. REP. 48 (Supp. 1928) (General Order No. 40).

272. *See* 47 U.S.C. § 254 (2006); NUECHTERLEIN & WEISER, *supra* note 207, at 348–55.

273. *See* NUECHTERLEIN & WEISER, *supra* note 207, at 339–43.

roads and more post offices per capita than any other nation on earth.[274] Government even "burdened" private speakers to ensure universality; beginning in 1792, it forbade private individuals from entering the postal business,[275] to reduce government's cost of serving all Americans.[276] The 1792 law permitted entry, however, where "mail is [not] regularly carried"—also in order to expand coverage.[277] Partly because of such policies, by the early 1800s, newspapers "were more common in America than anywhere else."[278]

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.[279] 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.[280] 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.[281] *Wireless phone* service is also part of this system.[282] Further the FCC's procedures for granting cellular licenses had the "primary goal" of "nationwide availability of service."[283] Moreover,

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274. *See* KIELBOWICZ, *supra* note 172, at 46; Peter J. Wosh, *Going Postal*, 61 AM. ARCHIVIST 220, 224 (1998) (review essay).

275. *See* KIELBOWICZ, *supra* note 172, 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).

276. *See* NUECHTERLEIN & WEISER, *supra* note 207, at 52-55 (discussing the economics of monopoly cross-subsidization).

277. *See* STARR, *supra* note 14, at 48.

278. *Id.* at 48. By 1880, total U.S. weekly circulation exceeded European circulation, even though Europe had ten times the U.S. population. *See id.* at 87.

279. *See id.* at 171. By the early 1850s, almost every major city had telegraph service. *See* KIELBOWICZ, *supra* note 172, at 152.

280. *See, e.g.*, 47 U.S.C. § 254 (2006); *see also* HUBER, *supra* note 218, at 539–90.

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

282. *See* HUBER, *supra* note 218, at 964–65.

283. *See* Cellular Communications System, 86 F.C.C.2d 469, 502 (1981), *modified on recons.*, 89 F.C.C.2d 58 (1982).

government routinely requires build-out of service to an entire service area.[284]

For *broadcasting*, some examples include the television allocation plans in the 1950s, which prioritized rapid, universal deployment;[285] First Amendment objections were not raised in the Supreme Court cases upholding the plan.[286] 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)[287] and the disabled (through closed captioning).[288] 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.[289] Congress requires state and city governments to ensure that cable is not denied any group based on income level,[290] and localities generally require cable companies to serve the entire community.[291] Finally, for *Internet access*, Congress has required the FCC to promote the deployment to all Americans,[292] and directed the FCC to draft a plan to that effect.[293] 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 to Internet spaces.[294] The FCC is now transitioning the subsidy system for phone service to Internet service.[295]

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284. *See* 700 MHz, *supra* note 220 at 15,348, 15,543 (2007) (imposing strict performance requirements); HUBER, *supra* note 218, at 916 (discussing timed build-out requirements for narrowband and broadband PCS).

285. *See* sources cited *supra* note 265.

286. *See, e.g.*, *FCC v. Allentown Broad. Corp.*, 349 U.S. 358 (1955); *Peoples Broad. Co. v. United States*, 209 F.2d 286 (D.C. Cir. 1953).

287. *See* Policies and Rules Concerning Children's Television Programming, 11 FCC Rcd. 10,660 (1996); *see also* 47 U.S.C. §§ 303a-303b (2006); S. REP. NO. 101-227, at 17 (1989) (defending the constitutionality of the Children's Television Act of 1989).

288. *See Motion Picture Ass'n of Am. v. FCC*, 309 F.3d 796, 798–800 (D.C. Cir. 2002).

289. *See Turner II*, 520 U.S. 180, 185, 189–94 (1997); *Satellite Broad. & Commc'ns Ass'n v. FCC*, 275 F.3d 337, 343 (4th Cir. 2001) (citing H.R. REP. NO. 106-464, at 101 (1999)(Conf. Rep.)).

290. *See* 47 U.S.C. § 541(a)(3) (2006).

291. *See, e.g.*, Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, 22 FCC Rcd. 5101, 5102, 5116–22 (2007).

292. *See* 47 U.S.C.A. § 1302 (West 2011).

293. *See* FCC, *supra* note 14.

294. NUECHTERLEIN & WEISER, *supra* note 207, at 296–301 (discussing the history and debate over this "ISP exemption").

295. *See, e.g.*, Connect America Fund, 26 FCC Rcd. 4554, 4557–601 (2011).

Litigants have argued such laws requiring cable and phone companies to serve rural and poor areas "compel the speech" of these companies, who must "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.[296]

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.[297]

All these examples support the Supreme Court's often cited "basic tenet": "the widest possible dissemination of information" serves the First Amendment.[298]

III. NORMATIVE IMPLICATIONS

As Part II has established, 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

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296. *See, e.g.*, *Century Fed., Inc. v. City of Palo Alto*, 710 F. Supp. 1552, 1553–54 (N.D. Cal. 1987) (applying "the rationale in *Miami Herald*" 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).

297. *See Martin v. City of Struthers*, 319 U.S. 141, 145–46 (1943) (discussing door-to door leafleting).

298. *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

"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 which should be seen as merely being means to promote substantive speech ideals.

For doctrine, the principles suggest that (1) some widely held conceptions of democracy and autonomy support the argument that (2) the First Amendment is, and should be, concerned with the availability of speech spaces and (3) that the judiciary should use fairly consistent tests, not a patchwork of exceptions, to implement that concern. 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 normative implications are not found in mere dicta or academic 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 in constitutional matters.[299] While the literature debating legislative constitutionalism and judiciary supremacy is significant and insightful, the free speech guarantee is often

299. *See, e.g.*, LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW *passim* (2004); TUSHNET, *supra* note 102, *passim*; Jeremy Waldron, *The Constitutional Conception of Democracy*, *in* DEMOCRACY 51, 51–84 (David Estlund ed., 2002); 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. NOTICE & COMMENT, Sept. 18, 2006, http://hlpronline.com/2006/09/what%E2%80%99swrongwithconservativeconstitutionalism-two-styles-of-progressive-constitutional-critique-and-the-choice-they-.

considered a quintessential judicial right, rather than a right fit for a large legislative role.[300]

As we have seen, however, 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).

Despite common assumptions that the judiciary should articulate and enforce all constitutional norms regarding freedom of speech, the legislature should have a pivotal role in shaping constitutional norms. While I argue that the political branches should have the power to open additional spaces for all Americans, based on substantive speech considerations, I do not argue that the judiciary must *require* the legislature to adopt particular telecommunications or communications rules.[301] One can accept that adequate spaces are necessary for free speech without accepting that the *judiciary* must define the scope of those spaces. As a matter or political legitimacy, such decisions should follow the usual rule of democratic decision-making through the political branches, rather than the exceptional method of judicial review. On the margins, the judiciary should rule out some political decisions—such as those turning on viewpoint—but there should be a wide range of options for the legislative branch. As Joshua Cohen has argued in the context of campaign finance reform, there are competing and distinct conceptions of democracy, several of which may be envisioned by the Constitution. The Constitution does not clearly select any one conception.[302] Moreover, there are likely competing and

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300. *See* sources cited *supra* note 101; *see also* TUSHNET, *supra* note 102, at 130; Owen Fiss, *Between Supremacy and Exclusivity*, 57 SYRACUSE L. REV. 187, 199–200 (2007).

301. Some thoughtful thinkers would go farther than I do regarding communications policy. *See* Gregory P. Magarian, *Market Triumphalism, Electoral Pathologies, and the Abiding Wisdom of First Amendment Access Rights*, 35 HOFSTRA L. REV. 1373, 1388–1405 (2007).

302. *See* Joshua Cohen, Professor, Stanford Univ., 2011 Dewey Lecture in Law and Philosophy: Democracy v. *Citizens United*? at the University of Chicago

distinct means to reach the goal of furthering a conception of democracy, and these means are not necessarily selected by the Constitution. Choosing among the conceptions and among the means is a political decision as much as it is a legal decision. It is not clear that the *judiciary*, rather than the *legislature*, should make that decision. In the context of speech spaces, the legislature has as much legitimacy to adopt decisions to open spaces for speech. If the legislature, based on democratic processes, pursues a democratic vision supporting widely available speech spaces for robust political and cultural debate, and determines particular policies to promote such access, the judiciary should be seen to lack the legitimacy to short-circuit the democratic decision-making underlying these decisions by choosing among particular conceptions of democracy and means to further those conceptions.

Further, while neither the judiciary nor the political branches are perfect, the political branches have comparatively more competence in determining the details necessary to open spaces for speech. Take network neutrality, again, as our example. Setting out and enforcing an appropriate network neutrality rule requires understanding engineering differences among cable, DSL, fiber, and mobile networks. Unlike the FCC, the judiciary generally has no engineers. Unlike Congress, the judiciary generally does not have committees and dedicated staff focused on the issues of telecommunications and media policy. Rather, judges are generalists, with varying levels of technical expertise, often in their seventies and eighties with a few legal clerks who are recent graduates of law schools, not engineering schools.[303] Further, judges decide cases *ex post*, rather than address issues *ex ante*. But early policy decisions regarding a technology have a disproportionate effect on the path a technology will take, and whether it will support spaces for speech. By the time cases make it to the courts, the technology may have established structures that close spaces to popular speech. The historical example of the telegraph illustrates this point; by the time the Supreme Court suggested common carriage for the telegraph, the telegraph monopoly had already come to support a news monopoly. Meanwhile, while the judiciary has limitations, it can set out outer bounds to ensure that the political branches are not targeting disfavored content or deliberately closing off access to necessary speech spaces.

Law School (Apr. 20, 2011), *available at* http://www.youtube.com/watch?v=fiWJAdFTIxQ.

303. *Cf.* Joseph Goldstein, *The Oldest Bench Ever*, SLATE (Jan. 18, 2011), http://www.slate.com/articles/news_and_politics/jurisprudence/2011/01/the_oldest_bench_ever.single.html (noting that twelve percent of federal judges are over eighty years old).

Through constitutional 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.

We can think of the legislatures' role in one of three ways. First, legislatures may be selecting and entrenching constitutional norms, acting as innovative "norm entrepreneurs."[304] If the constitutional text allows several reasonable interpretations—of "freedom of speech" or "interstate commerce"—the legislature may be permitted to select from a range of equally constitutional choices. Indeed, most legislation is constitutional, and this legislation entrenches constitutional norms, both informally through practice and formally through doctrines such as deference to long congressional practice.[305]

Second, a distinct and alternative view is that legislatures and executives may be supplying remedies to validate rights chosen by the judiciary.[306] Because legislatures and executives have superior institutional competence in implementing some remedies, such as designing postal and telecom rules, they can provide remedies through legislation that are unavailable to the judiciary, though the judiciary itself must endorse or select the norms.

Third, and related to the notion of norm entrepreneurship most simply, legislators are compelled to follow the Constitution, and swear to uphold it. Legislators and executives themselves are therefore subject to an obligation under the First Amendment: to ensure no law abridges the freedom of speech. Legislators can conclude that a law permitting media consolidation or closing off digital spaces through property-like telecommunications rules would abridge freedom of speech.[307] As a

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304. *See* WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 7–9 (2010).

305. *See, e.g.*, *Eldred v. Ashcroft*, 537 U.S. 186, 201–03 (2003); Desai, *supra* note 174, at 674 ("The judges who interpreted the First Amendment in my examples were in fact constitutionalizing legislation; they took earlier policy choices [about the Post Office] made by Congress and embedded them into the Constitution.").

306. *See* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 884–89 (1999) (suggesting a constitutional right does not exist separately from the available remedy to vindicate that right); Schauer, *Hohfeld's*, *supra* note 42, at 928–30 (discussing rights under-enforcement and underinclusion).

307. The Supreme Court has even noted legislators' and executives' speech-conscious motives in promoting diverse sources and speech spaces. *See, e.g.*, *Turner II*, 512 U.S. 622, 662-63 (1994); *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

result, the First Amendment would impose an affirmative obligation on legislatures and executives, though not one enforced by the judiciary. Congress might have an affirmative obligation to adopt network neutrality and adopt the technical details of the rule, while the judiciary may not have the same obligation, as it lacks the comparative institutional competence to effectuate an appropriate rule. Moreover, if the legislature has a constitutional obligation, rather than mere constitutional permission, to open spaces for speech, then political advocates for space-promoting rules can rely on the rhetorical force of the First Amendment in making arguments before political, non-judicial institutions such as the FCC and Congress. Invoking the First Amendment is already common in debates over speech policy; advocates often called network neutrality the Internet's First Amendment.[308] Moreover, if Congress *is* subject to such an affirmative obligation under the First Amendment, then access rules, universal service rules, and ownership limits would receive their constitutional authority not only from the Interstate Commerce Clause but also from the First Amendment that Congress often invokes in adopting such rules.[309]

If we overlook the important political influence of rhetoric,[310] and compare these three perspectives from a purely theoretical or practical lens, it "may be that not a great deal turns on the difference" among these conceptions.[311] Whether the legislature is determining constitutional norms, is merely supplying remedies, or is under an independent affirmative obligation, the legislature would have the power to enforce and to interpret constitutional norms of free speech. The key point is that the legislature and executive should be involved in speech decisions, in ways that further free speech values and improve access for all speakers. The judiciary should not cut off a discretionary role for the legislature, so much as monitor for what we could consider to be abuses of that discretion.

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

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308. *See, e.g.*, Sara Jerome, *Net Neutrality Fight Turns to First Amendment*, NAT. J., Dec. 28, 2009.

309. I thank Pamela Karlan and others at Stanford for this point, and thank Joshua Cohen for noting the limitations of this point.

310. *See, e.g.*, GEORGE LAKOFF, DON'T THINK OF AN ELEPHANT!: KNOW YOUR VALUES AND FRAME THE DEBATE xv-xvi, 3–10 (2004).

311. Schauer, *Hohfeld's*, *supra* note 42, at 929–30 (discussing two of the conceptions).

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 arguing that sufficiency is a more workable and desirable guideline.[312]

An equality norm for freedom of speech creates some problems that a sufficiency norm lacks.[313] To ensure "equality," as suggested, one 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*,[314] a Supreme Court decision in 1976 that struck down a limit on candidates' campaign finance expenditures and individuals' independent expenditures,[315] the Court stated:

> [T]he 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

312. *See* Harry Frankfurt, *Equality as a Moral Ideal*, 98 ETHICS 21, 21–22, 33–35 (1987); *see also* SWIFT, *supra* note 138, at 92-101 (discussing sufficientarian theories and contrasting them with egalitarianism); Paula Casal, *Why Sufficiency Is Not Enough*, 217 ETHICS 296, 296 n.2 (2007) (collecting sources); Fee, *supra* note 42, at 1106 ("The 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).

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

314. 424 U.S. 1 (1976).

315. *Buckley*, 424 U.S. at 3–4. *Buckley* also upheld a limit on contributions, but for non-speech, corruption reasons. *Id.* at 23–29. The negative-liberty model suggests that part of the decision is wrong. *See* Sullivan, *Two Concepts*, *supra* note 42, at 167–70.

> 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.[316]

While the second phrase of this "canonical sentence"[317] 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."[318] For example, then-Professor Elena Kagan referred to this phrase simply as "*Buckley*'s antiredistribution principle," and stated 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 opinion."[319] But, as suggested in the previous Part, many laws "restrict" speech to 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[320]—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* (or perhaps primarily) to equalize it as opposed to promoting additional speech spaces, diversity, or other core First Amendment goals.

On the other hand, beyond restrictions, if government chooses to pursue equality, not through restriction but subsidies, 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

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316. *Buckley*, 424 U.S. at 48–49 (quoting *N.Y. Times v. Sullivan*, 376 U.S. 254, 266 (1964)) (internal quotation marks omitted).

317. *See* Sullivan, *Two Concepts*, *supra* note 42, at 156 (referring to the first phrase as the "sentence").

318. *Id.* at 158.

319. Kagan, *supra* note 27, at 464–65. 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. *Id.* at 64. 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.C.

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

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. A subsidy for sufficiency could likely be widely available and equivalent for all rather than varying for each person in the search for equality. Indeed, with campaign finance, the Supreme Court accepts public financing that provides a particular amount to either candidate, but not one that attempts to equalize speech power by tying subsidies directly to the money spent by opponents.[321] The general availability of a subsidy—or the general availability of a speech space—yields less opportunity for government abuse.

Pursuing sufficiency over equality, however, would not justify restrictions while it would help to justify our current system for public funding of presidential elections. The availability of such funds more likely aims to ensure sufficient resources for an election, rather than equality with the other candidate. For example, in 2008, while John McCain took public funds and was 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.[322] Further, because government provided a specific sum to McCain no matter how much Obama raised or spent, the funds could not discourage Obama's spending. While the sufficient sum of public funds may have depended on how much Obama spent, and therefore determining sufficiency would require considerations of relative equality (and therefore evaluation of relative equality may be necessary in determining sufficient speech resources), it could also have turned on more independent factors, such as the cost of crisscrossing the nation and purchasing advertisements.

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321. *C.f. Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2814, 2828–29 (2011); *Davis v. FEC*, 554 U.S. 724, 739–40 (2008). I do not agree with these decisions. This interpretation of them is merely a narrower interpretation than an anti-redistribution interpretation, makes better sense of the cases, and leads to more normatively desirable outcomes. Further, of course, the amount of money "sufficient" to run may depend on the amount spent by the other candidates, if they opt out of public finance and spend unlimited amounts, and on the amount spent by outside parties. Nonetheless, determining a "sufficient" minimum appears to be both easier and less prone to abuse than determining "equal" amounts.

322. Fredreka Schouten, *McCain Raises Cash While Limited to Public Funds: Obama Also Aided by Money outside His Campaign*, USA TODAY, Sept. 10, 2008, at 4A (noting McCain was raising cash for Republican groups committed to his election).

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 may be less severe than those associated with equality. Determining a sufficient minimum—for spaces or funds—is not easy.[323] But, as suggested, in determining minimally sufficient spaces, the judiciary can piggyback on legislative expertise, deferring to government's expertise in opening spaces, while requiring government to designate spaces evenhandedly. If the legislature determines that Republicans need access to the Internet to speak "sufficiently," then the judiciary can require that Democrats need such access as well, also to speak sufficiently.[324]

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, and this principle is independent of whether the Amendment should also pursue *equality* of speech power. For example, the traditional public forum doctrine supports all to speak on street corners and parks, more likely ensuring diverse sources though not necessarily equality of speech power. Not every speaker in the forum will have the same speech resources; well-funded petition drives may have a far greater voice than the apocalyptic loner wearing cardboard signs. But speakers and listeners will have access to the views of multiple, by-definition diverse sources, even if those sources lack "equal" speech power. For legislated spaces, government can open spaces to all without content- or viewpoint-discrimination, which similarly would likely result in speakers with diverse views, if not equal speech power. While the relation between diversity and equality is complex, further

323. *See, e.g.*, Casal, *supra* note 312, at 313 n.46 (referencing several works that attempt to specify a sufficient minimum).

324. Some equalizing may be necessary to promote sufficient speech if speech is a positional good, the effective exercise of which is tied to equality. Further scholarship can pursue the important implications of recognizing sufficiency's role in First Amendment analysis.

scholarship should address these issues, without ignoring the core role of diversity in speech theory, simply by delivering arguments more directly addressing equality than diversity.

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).[325] 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 further deeper commitments. As elaborated in the next Sections, those commitments include furthering democracy and individual autonomy. To the extent that negative liberties or positive liberties ensure broad access to speech spaces for all, affirmative *or* negative tools can further the goals of democracy and autonomy.

C. Architecture and Doctrine

Moving from theory to doctrine, I argue that (1) depending on our chosen normative conceptions of democracy and automony, 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 does not target disfavored

325. *See* JOSHUA COHEN, *Freedom of Expression*, *in* PHILOSOPHY, POLITICS, DEMOCRACY: SELECTED ESSAYS, *supra* note 138, 98, 106–08.

content for suppression, 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 identified in this Article.

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 general (higher-level) principles and to more specific (lower-level) 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 principles.[326] While some proposed underlying goals are more specific than others, democracy and individual autonomy are generally the most widely accepted rationales.[327]

But neither of these terms is self-defining. In fact, defining these terms has been subject to intense debate among political philosophers (and those in other disciplines) for centuries.[328] 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).[329] 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

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326. *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 23–35 (1971).

327. *See supra* notes 38-39 and accompanying text.

328. *See, e.g.*, ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 5–7 (1989); HELD, *supra* note 38, at 2-7; SWIFT, *supra* note 138, at 180-83.

329. *See, e.g.*, DAHL, *supra* note 328, at 83–88 (discussing intrinsic equality and democracy); RAWLS, *supra* note 312, at 302-03 (justifying inequality under some conditions when promoting "justice," not democracy, under the "difference principle"); JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 269 (10th ed. 1965); David Estlund, *Political Quality*, *in* DEMOCRACY, *supra* note 299, at 175, 178–79 (justifying some inequality where inequality can increase the quality of democratic decisions); Fiss, *supra* note 300, at 201 (calling "equality of all citizens . . . the moral foundation of democracy"); *see also* BAKER, MARKETS, *supra* note 38, at 129–53 (contrasting formal democracy conceptions with more substantive theories); SWIFT, *supra* note 138, at 55–64 (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).

autonomy.[330] Some focus on the importance of deliberation in democracy. Deliberative democracy theorists often specify necessary assumptions for discourse.[331] Indeed, in a well-known book David Held sets forth nine different models of democracy; each model has its own variations. These models include small-scale direct democracy, republican democracy, liberal democracy, technocratic democracy, and deliberative democracy.[332] 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."[333] Normative analysis differs based on which conception of democracy or autonomy we use.

At the same time, theorists define autonomy in radically different ways. Autonomy refers generally to the liberty of an individual to live the life he or she chooses.[334] But there are many conceptions of autonomy. 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.[335] Second, autonomy may entail a lack of external constraints to an individual's decisions, often termed "negative liberty."[336] Some theorists focus on governmental restraints, while others include other human-made constraints, such as lack of resources.[337] 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 because they decide without understanding all of their life options.[338]

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.[339] Therefore,

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330. *See, e.g.*, SWIFT, *supra* note 138, at 179–223 (providing an overview).

331. *See, e.g.*, HELD, *supra* note 38, at xi, 231–255 (discussing deliberative theorists including Jurgen Habermas and Joshua Cohen).

332. *See id.* at v-vii.

333. *See* BAKER, MARKETS, *supra* note 38, at 129–53.

334. *See* SWIFT, *supra* note 138, at 51–90. Many, but not all, theorists use liberty and autonomy interchangeably. David Miller, *Introduction*, *in* THE LIBERTY READER 1, 2 n.1 (David Miller ed., 2006).

335. *Id.* at 2-3.

336. *See* BERLIN, *supra* note 4, at 120-24.

337. *See id.* at 122 (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 138, at 71–72.

338. *See* Benkler, *Autonomy*, *supra* note 39, at 41–72; Miller, *supra* note 334, at 3–4.

339. *See, e.g.*, SWIFT, *supra* note 138, at 204–07.

democracies would ensure greater autonomy for this reason alone. Second, and related, when individuals decide for themselves in a democracy, they develop their capabilities and faculties and increase autonomy.[340] Third, if autonomy consists of freedom from overbearing governmental constraints, then a democratic system in practice 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 has no choice but to rest on a respect for individual autonomy—that subjecting every personal decision (like whom to marry, what to eat that day) to government decision-making would subject citizens to a homogenizing lack of capabilities undermining their effective participation, as well as a lack of diversity crippling deliberation, which thrives on diverse views.

At the same time, autonomy and democracy can conflict. Indeed, theorists often debate the tension between liberty (or autonomy) and equality (implicit in conceptions of democracy). For example, 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 person does not choose the winning candidate or the position "forced" upon her by the majority vote. Others see no tension, as the democratic minorities freely choose to accept the results of fair elections.[341]

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.[342] 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.[343] 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.

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340. *See* ROSS HARRISON, DEMOCRACY 106–08 (1993) (discussing John Stuart Mill).

341. *Id.* at 1–13; SWIFT, *supra* note 138, at 197–200.

342. *See, e.g.*, sources cited *supra* note 3.

343. *See, e.g.*, ELY, *supra* note 101, at 101–31.

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 and 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 democracy,[344] or that the democratic benefits of access should trump the autonomy of the owners,[345] 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.[346]

As this brief discussion suggests, analysis turns on the definitions of key terms and the normative commitments underlying those definitions. Indeed, 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. (Law is not much different in terms of its deep reliance on shared assumptions. For example, law and economics analysis rests on a host of assumptions—regarding utility, distribution, Kaldor-Hicks efficiency, and static efficiency—that largely drive analysis.)[347] Some of the leading theorists turn to thought experiments about "ideal" speech situations (for example, Habermas)[348] or an "initial agreement" that people would *likely* accept in a hypothetical "state of nature" (Hobbes, Locke, Rousseau)[349] or behind a "veil" (Rawls).[350]

Rather than attempt a normative analysis applying Held's nine democracy models, Baker's four models, at least three definitions of autonomy, and several conceptions of the overlap and tensions among

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344. *See, e.g.*, FISS, *supra* note 68, at 4–6 (arguing against this view).

345. Baker, *Turner*, *supra* note 57, at 71 (rejecting autonomy claims of corporations).

346. *See* Ronald Dworkin, *Do Liberty and Equality Conflict?*, *in* LIVING AS EQUALS 39, 39–43 (Paul Barker ed., 1996).

347. *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).

348. *See, e.g.*, HELD, *supra* note 38, at xi, 231–55 (discussing deliberative theorists including Jurgen Habermas and Joshua Cohen).

349. *See* THOMAS HOBBES, 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).

350. RAWLS, *supra* note 312, at 11. Legal theorists also turn to idealized examples. RONALD DWORKIN, LAW'S EMPIRE 1–5 (1986).

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 some commonly accepted conceptions of democracy and autonomy support the model described in this paper and 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.[351] Many have lamented the inadequacy of the traditional public forum doctrine in ensuring ample spaces for communication.[352] Academics have provided less analysis and support for *legislated* access to spaces, private or public. But, from a speaker's point of view, access is as effective whether provided by constitutional or statutory means. So long as the judiciary (and the public) remains 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, thereby subjecting the decision to democratic debate. Further, the judiciary can impose some limits to ensure government does not suppress speech or overly burden the autonomy of some owners—such as forcing people to open their homes to speech. Indeed,

351. *See, e.g.*, Kalven, *supra* note 27.
352. *See, e.g.*, ZICK, *supra* note 7, *passim*.

cases involving homes already impose major limits. Further, in *Prune Yard*, the leading case about legislated access to shopping malls, the Court listed several factors that would limit government discretion to determine that a space should be open to other speakers, including whether a space is more public and if listeners would not attribute independent speech to the property owner.[353]

3. THE FIVE ARCHITECTURAL PRINCIPLES HAVE NORMATIVE SUPPORT

Under some, but of course not all, accepted normative conceptions of democracy and autonomy, 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.[354] Recently, Dan Solove and Marc Blitz have provided powerful arguments for privacy rights rooted in the First, rather than Fourth, Amendment, for similar reasons.[355]

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.[356]

Second, less often, theorists have defended government's discretion to open spaces to speech. Legislation to open private spaces will likely lead to more discursive spaces than lack of such legislation.[357] 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

353. *See* sources cited *supra* note 120.

354. *See* POST, *supra* note 89; Post, *supra* note 39.

355. *See* Blitz, *supra* note 128, at 362; Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112, 113–20 (2007).

356. *See, e.g.*, CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 101–03 (1995).

357. 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 38, at 7–62. They are subject to overwhelming economies of scale and network effects. *See* NUECHTERLEIN & WEISER, *supra* note 207, at 4–16. Their owners have incentives to discriminate against some content rather than to carry all content. *See* BARBARA VAN SCHEWICK, INTERNET ARCHITECTURE AND INNOVATION 298–354 (2010).

forums. The analysis here suggests that judicially required spaces may be exceptions not to negative liberty regarding individual speech but rather exceptions 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.[358]

Third, theorists (and judges) have generally argued that rules promoting diverse sources serve "values central to the First Amendment."[359] 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.[360] 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.[361] 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.[362] Prominent examples include Silvio Berlusconi in Italy, who used his media empire to become Italy's longest serving (extremely corrupt) prime minister,[363] and the Associated Press-Western Union in our history, which influenced elections and legislation.[364] 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.[365] While many researchers and academics have argued that negative liberty and free market economics would lead to diversity of views under particular conditions, whether or not there is diversity of owners,[366] others have disagreed with the assumptions,[367] argued against taking that risk,[368] or

358. *Cf.* ELY, *supra* note 101, at 101–31 (describing the minimal civil liberties necessary to ensure a political process by which the citizenry can then properly determine politically-crafted liberties and entitlements).

359. *Turner I*, 512 U.S. 622, 663 (1994).

360. *See* BENKLER, WEALTH OF NETWORKS, *supra* note 39, *passim.*

361. *Id.* at 234–71.

362. *See* BAKER, OWNERSHIP, *supra* note 68, at 16.

363. *See, e.g.*, Enrique Armijo, *Media Ownership Regulation: A Comparative Perspective*, 37 GA. J. INT'L & COMP. L. 421, 439–44 (2009).

364. *See* WU, *supra* note 205, at 22-24.

365. For penetrating analysis of this question, see, e.g., BENKLER, WEALTH OF NETWORKS, *supra* note 39; BAKER, OWNERSHIP, *supra* note 68.

366. *See, e.g.*, Jack H. Beebe, *Institutional Structure and Program Choices in Television Markets*, 91 Q.J. ECON. 15, 35–36 (1977); Ho & Quinn, *supra* note 243 at 784–86.

367. *See* BENKLER, WEALTH OF NETWORKS, *supra* note 39, at 165–69, 205–07; Ho & Quinn, *supra* note 243, at 794–98 (discussing scholarly dissensus).

pointed to research demonstrating links between ownership and viewpoint diversity.[369] 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*.[370]

Fourth, theorists have defended both spaces designed to discuss matters of local concern and those to promote national speech.[371] 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 press in addressing the challenge.[372] 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.[373]

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368. *See, e.g.*, BAKER, OWNERSHIP, *supra* note 68, at 16 (arguing "*no democracy should risk the danger*," however small, of a dominant media mogul controlling politics).

369. *Research Studies on Media Ownership*, FCC (July 31, 2007), 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 FCC Rcd. 13,620, 13,764–65 (2003) ("[W]e do not dispute [the anecdotal evidence] that a particular outlet may betray some bias, particularly in matters that may affect the private or pecuniary interest of its corporate parent . . . ."); Mike Kinsley, *Slate and Microsoft*, SLATE (Dec. 26, 1997, 3:30 AM), http://www.slate.com/id/2217/.

370. *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. 311, 344–45, 365–66 (2011); *cf.* 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.

371. Indeed, the traditional public forum and other designated physical forums are likely to ensure speech about local matters.

372. *See* DAHL, *supra* note 38, at 93–95, 97, 106.

373. *See* ANDERSON, *supra* note 262, at 32–40.

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 having access to radio in the 1930s, are better able to affect government policy than other rural areas.[374]

4. 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 the private and publicly owned. We can adopt the prevailing legal assumption that the law should treat like situations consistently and distinguish its treatment based on legally relevant, rather than arbitrary, distinctions.[375] 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 when determining how 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, receive minimal to no scrutiny when government requires those spaces to be open for all,[376] though not when government regulates its content.[377]

Third, scrutiny for opening private, physical spaces like shopping malls similarly does not include a narrow tailoring test.[378]

Fourth, radio and television broadcasters can be regulated subject to a "minimal" scrutiny[379] associated with *Red Lion*,[380] though a different case applies to indecency.[381] In the D.C. Circuit, satellite

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374. *See, e.g.*, David Strömberg, *Radio's Impact on Public Spending*, 119 Q.J. ECON. 189, 189 (2004).

375. *See, e.g.*, Oona A. Hathaway, *The Cost of Commitment*, 55 STAN. L. REV. 1821, 1837 & n.52 (2003).

376. *See* ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM 2 (1983).

377. *See Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126, 130-31 (1989).

378. *See PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980).

379. *See Turner I*, 512 U.S. 622, 651–52 (1994).

380. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969).

381. *See FCC v. Pacifica Found.*, 438 U.S. 726, 770 & n.4 (Brennan, J., dissenting).

broadcasting also receives the *Red Lion* "minimal" standard, though the Supreme Court has not spoken to the issue.[382] As this standard appears tied to wireless frequencies,[383] other wireless technologies may be subject to it, including allocations, assignments, and license conditions for wireless Internet service and "mobile television."[384]

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 (Turner I)*[385], decided in 1994, which imposed a narrow-tailoring requirement.[386] That test, however, applies with widely varying ferocity[387] 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.[388] (The next Section will discuss both *Red Lion* and *Turner I*.)

Sixth, a newspaper owner *may* be treated as a "speaker" no less than a pamphleteer, though the Supreme Court has upheld some ownership limits affecting newspaper owners and has assumed the constitutionality of rules affecting what was long newspapers' primary means of reaching readers—the postal service.[389]

Seventh, it is not yet settled where Internet spaces fit in. The FCC has chosen the phone standard, permitting wide discretion.[390] So have some district courts,[391] though others have not.[392] While the Supreme

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382. For satellite, there is a circuit split. *Compare 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), *with Time Warner Entm't Co. v. FCC*, 93 F.3d 957, 974–77 (D.C. Cir. 1996) (applying *Red Lion* to uphold three percent must-carry set-aside for noncommercial stations on satellite).

383. *See* C. Edwin Baker, *Keynote Address: Three Cheers for* Red Lion, 60 ADMIN. L. REV. 861, 866–67 (2008).

384. *See* Brief of *Amici Curiae* Free Press et al. in Support of Neither Party at 6, 21–41, *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009) (No. 07-582), 2008 WL 2415162.

385. 512 U.S. 622 (1994).

386. *Id.* at 637–41.

387. *Compare Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1129 (D.C. Cir. 2001), *with Time Warner*, 93 F.3d at 966–67.

388. *See, e.g.*, *Time Warner*, 240 F.3d at 1128; *Time Warner*, 93 F.3d at 966–67.

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

390. *See* FCC, *Open Internet*, *supra* note 15, at 17,981–85.

391. *See, e.g.*, *AT&T Corp. v. City of Portland*, 43 F. Supp. 2d 1146, 1154 (D. Or. 1999), *aff'd* 216 F.3d 871 (9th Cir. 2000).

392. *See, e.g.*, *Ill. Bell Tel. Co. v. Vill. of Itasca, Ill.*, 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*

Court has selected a standard for Internet indecency, indecency decisions are generally irrelevant for judicial standards concerning architecting.[393] Selecting a standard that requires narrow tailoring of the burden on cable and phone companies (like *Turner I*) would undermine government's ability to engage in basic architecting of Internet spaces to promote access for more Americans without challenges from phone and cable companies asserting their free speech rights.

We should replace this mess of at least seven standards unless we can justify the distinctions adequately. The model set forth in this Article enables courts to treat like cases alike, in conformity with standard rule of law principles. Applying the architectural principles would be attentive to practical reality, and would not carve up technologies and spaces based on arbitrary distinctions.

5. THE APPLICABLE "TEST": "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 a governmental interest (compelling, important, or legitimate, respectively) and each requires tailoring of some sort (a strict narrow tailoring, 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 viewpoints or otherwise suppress particular content. A threshold question prompting this test is whether the government is regulating a speaker (or "editor") or a space (which some call a "conduit").[394] The Court

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Cablevision of Broward Cnty., Inc. v. Broward Cnty., Fla., 124 F. Supp. 2d 685, 694 (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).

393. *See Reno v. ACLU*, 521 U.S. 844, 871 (1997) (addressing a "content-based regulation of speech"); *Sable Commc'ns 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. . . . [A]lthough scarcity has justified *increasing* the diversity of speakers and speech, it has never been held to justify censorship." (quoting *Pacifica Found. v. FCC*, 556 F.2d 9, 29 (1977)) (internal quotations marks omitted)).

394. *See supra* Part II.B.

has already enunciated a useful test for determining whether an owner receives protection as a speaker or editor, or whether the relevant property may be regulated as a space for others' speech in *PruneYard*, the leading shopping mall decision.[395] Courts can easily determine when an architectural test may apply, based on the parties' claims, just as courts apply the tests for libel or copyright infringement.

While my proposed standard ("compelling interest" and "nondiscrimination"/"nonsuppression") 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 that government need not "narrowly tailor" its actions to promote core speech principles, but can instead promote the widest means for pursuing these important goals.

Opting for a principled test other than a traditional scrutiny standard has antecedents and benefits. Tests based on principles rather than scrutiny standards are often effective. Libel against a public figure requires "actual malice,"[396] speech calling for violence must be "directed to inciting or producing imminent lawless action and [must be] likely to incite or produce such action,"[397] 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."[398] 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 possible dissemination of information from diverse and antagonistic sources."[399] Indeed, this test conforms to 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.[400]

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395. *See* sources cited *supra* note 120.

396. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

397. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

398. *Virginia v. Black*, 538 U.S. 343, 359 (2003).

399. *Time Warner Entm't Co. v. FCC*, 93 F.3d 957, 969, 975 (D.C. Cir. 1996) (quoting *Associated Press v. United States*, 326 U.S. 1, 20, 65 (1945)) (internal quotation marks omitted) ("Broadcasting regulations that affect speech have been upheld when they further this First Amendment goal.").

400. *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 784–87 (Kennedy, J., concurring in part and dissenting in part) (criticizing the plurality's "evasion" of enunciating a standard).

Second, using a principle to guide analysis may ensure more transparency than would traditional standards of scrutiny.[401] While standards appear to limit judicial discretion and avoid the substantive weighing of normative values, courts have considerable discretion to choose one standard or another or to apply a chosen standard with greater or lesser punch.[402] For example, courts have reached similar conclusions for similar spaces, from shopping malls to cable, telephone, and broadcast systems, but have had to use and bend a collection of different standards to do so.[403] Similarly, draft card burning was subject to intermediate scrutiny while flag burning received strict scrutiny, though laws prohibiting both appeared designed to target disfavored viewpoints. My proposed test is more comprehensible and transparent.

We could apply this test to a few examples. First, consider the contested example of network neutrality. The threshold question is whether we should look at Internet service providers like AT&T as speakers or whether we conceive of our communications as traversing cyber- or digital-spaces. This is an oft-debated question.[404] If the court agrees that government is regulating spaces rather than burdening speakers, then the judiciary need merely to ask whether the government is furthering a core architectural principle without viewpoint-discrimination or content-suppression. In this case, with network neutrality, the government is furthering at least two core architectural principles—opening additional spaces and promoting diverse sources.

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401. *See* 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"); 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).

402. *See* TRIBE, *supra* note 3, 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 57, 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, 1234 (1984) (arguing forum analysis has been "diverting attention from real first amendment issues").

403. *See, e.g.*, *Time Warner*, 93 F.3d at 971–77 (determining that rules promoting "public, educational, and governmental" channels were content-neutral, despite their apparent reference to content, and upholding them under the *Turner* standard, but relying on *Red Lion* to uphold the similar noncommercial access rule applying to satellite).

404. *See, e.g.*, Benjamin, *supra* note 60, at 1674–79; Rob Frieden, *Invoking and Avoiding the First Amendment: How Internet Service Providers Leverage Their Status as Both Content Creators and Neutral Conduits*, 12 U. PA. J. CONST. L. 1279 (2010); Yoo, *Free Speech, supra* note 95, at 697–98.

Government is not promoting a particular viewpoint or suppressing particular content. So network neutrality should be constitutional.

In other examples, the questions might be more difficult. Would a law "opening" coffee shops to speech fail the threshold question: should we think of a Starbucks (or an independent café) as a speaker, or merely as an owner of a space that could be legislatively opened to all? Would the circumstances of the law's passage reflect an attempt to censor certain viewpoints or messages?

6. REJECTING OTHER ALTERNATIVE TESTS

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."[405] He does not put forth much 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,"[406] a helpful but largely unspecified standard. Burstein proposes a "heightened rational basis" test, similar to that proposed by Justice Stephen Breyer for copyright law burdening speech.[407] Justice Breyer's standard is, however, vague; it is potentially strict *or* lax and does not cut directly to the censorship concern. My proposed 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 proposed test would also not support a court reaffirming the holding in *Red Lion* and would refine the test explicitly set out in *Turner I*. *Red Lion* is merely one of very many broadcast decisions addressing the constitutionality of particular broadcast laws and

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405. YOCHAI BENKLER, BRENNAN CTR. FOR JUSTICE, N.Y. UNIV. SCH. OF LAW, PROPERTY, COMMONS, AND THE FIRST AMENDMENT: TOWARDS A CORE COMMON INFRASTRUCTURE 30 (2001) [hereinafter BENKLER, WHITE PAPER].

406. *See* Baker, *Turner*, *supra* note 57, 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.

407. *See Eldred v. Ashcroft*, 537 U.S. 186, 244–45 (2003) (Breyer, J., dissenting); Burstein, *supra* note 68, at 1065 ("[T]he regulation should be subject to a minimal check for rationality: Is the regulation supported by a plausible economic theory?").

provisions,[408] though it is the most well-known and perhaps least popular.[409] *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 attacked by the broadcaster.[410] Critics of the decision, 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.[411] If *Red Lion* is wrong,[412] it is because the upheld rules had a punitive effect triggered by the broadcaster's chosen content, and this trigger punished the broadcaster based on the content, discouraging controversial speech. Meanwhile, ownership limits do not punish particular content; such limits apply to whatever content the outlet chooses, and courts have upheld such rules with far more academic and public support.[413] Nor do common carrier or must-carry rules include a content-trigger—something that the Supreme Court has highlighted in upholding such laws.[414]

Turner I announced a flawed constitutional test, though its holding agrees with my proposed test. *Turner I* upheld a statute that required cable operators (like Comcast) to carry local broadcast stations (like a CBS affiliate). [415] The intermediate-scrutiny test announced in *Turner I*, however, requires substantial evidence and narrow tailoring and applies when government enacts ownership limits, access rules, and perhaps other rules/laws *for cable television*.[416] Some lower courts have interpreted the substantial evidence and narrow tailoring requirements to impose significant constitutional barriers to laws designed to promote

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408. *See, e.g.*, *CBS, Inc. v. FCC*, 453 U.S. 367 (1981); *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775 (1978); *Nat'l Broad. Co. v. United States*, 319 U.S. 190 (1943); *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004).

409. *See, e.g.*, J. Gregory Sidak, *Telecommunications in Jericho*, 81 CALIF. L. REV. 1209, 1231 & n.63 (1993) (collecting commentary).

410. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 373–75 (1969).

411. Yoo, *Free Speech*, *supra* note 95, at 767–68.

412. 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) (upholding a conviction for draft-card burning as merely content-neutral regulation, when the specific law at issue against draft-card burning should have been deemed content- or, indeed, viewpoint-based).

413. *Cf. News Am. 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).

414. *Turner I*, 512 U.S. 622, 653–57 (1994).

415. *Id.* at 668.

416. *Id.* at 662-63.

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 I requires "substantial evidence" of an "important" interest and intermediate "narrow tailoring."[417] The important interest does not contradict my proposed test: an architectural principle will do. Indeed, in *Turner I*, the two "important interests" were universal access to information and promoting access to diverse and antagonistic sources.[418] Under my test, absent impermissible content discrimination, the inquiry would be complete. *Turner I*, however, requires narrow tailoring; narrow tailoring means furthering these important interests without burdening "substantially more *speech* than is necessary."[419] While cable laws affect "speech" among broadcast viewers, broadcasters, cable viewers, programmers, and operators,[420] some lower courts and observers merely ask whether a law at issue burdens the speech *of particular speakers*—the regulated cable companies.[421] It is *this* test, hinging on the burden imposed on a cable (or phone) company, that would cause problems for laws such as network neutrality. Opponents of network neutrality—and opponents of all other media architecting rules—claim a First Amendment right against regulation, seek *Turner* scrutiny, and then argue that government cannot impose a large burden on cable and phone companies to promote the freedom of speech of others. As a result of *Turner I*'s narrow-tailoring prong, these opponents now have a handful of (wrongly decided) circuit court precedents on their side. The D.C. Circuit once invoked *Turner I* to strike down horizontal and vertical ownership limits applying to cable television providers;[422] the Fourth Circuit and other Circuits invoked *Turner I* to strike down a rule that required phone companies to serve as common carriers for television content.[423]

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417. *Id.*

418. *Id.* at 663.

419. *Id.* at 665 (emphasis added) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)).

420. Justice Breyer's fifth-vote concurrence in *Turner II* even noted "important First Amendment interests on both sides of the equation." *Turner II*, 520 U.S. 180, 226–27 (1997) (Breyer, J., concurring in part).

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

422. *See Time Warner*, 240 F.3d at 1137–40, 1144.

423. *See Chesapeake*, 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).

As a result of these cases, to this day, corporate lobbyists, as well as scholars, frequently invoke *Turner I* as a constitutional obstacle for basic regulation to improve access for all Americans to speech spaces. They go beyond network neutrality and assert *Turner I* against rules enabling individuals to choose their own cell phone,[424] enabling cities to franchise cable operators[425] or to require build-out to all citizens in a community,[426] imposing common carriage on text messaging rather than letting a phone company deny access for "controversial" abortion-rights speech.[427] Broadcasters even urge courts to apply *Turner I*, rather than *Red Lion*, when they challenge ownership limits because it would give them a better shot at invalidating broadcast ownership limits.[428] Similarly, scholars and the industry assert *Turner I* applies to Internet access; almost every argument that network neutrality violates the First Amendment invokes *Turner I*.[429] These constitutional arguments not only encourage judicial second-guessing, but also they can discourage government action where an agency or legislature understands that a law promoting speech spaces will face constitutional obstacles in court.

Because *Turner I*'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 other network technologies.

Abandoning *Turner I* has one last virtue. While scholars suggest the negative-liberty model protects newspapers, canonically citing the 1974 decision in *Tornillo* that invalidated a state right-of-reply law,[430] 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

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424. 700 MHz, *supra* note 220, at 15,294.

425. *See, e.g.*, *Summary of Verizon's Complaint against Montgomery County, Maryland*, VERIZON (June 28, 2006), http://newscenter.verizon.com/press-releases/related-items/19887.pdf.

426. *See, e.g.*, *id.*

427. *See* Comments of Verizon Wireless, *supra* note 25, at 46–58.

428. *Prometheus Radio Project v. FCC*, 373 F.3d 372, 401–02 (3d Cir. 2004); *Fox Television Stations v. FCC*, 280 F.3d 1027, 1045–46 (D.C. Cir. 2002).

429. *See, e.g.*, Tribe & Goldstein, *supra* note 21, at 5; Yoo, *Free Speech*, *supra* note 95, at 739–50; Randolph May, *Time for the FCC to Respect the First Amendment*, INSIDER, Summer 2010, at 15, 19; Kyle McSlarrow, Pres., Nat'l Cable & Telecomms. Ass'n, Net Neutrality: First Amendment Rhetoric in Search of the Constitution: Remarks Before Media Institute (Dec. 9, 2009), *available at* http://www.ncta.com/PublicationType/Speech/Net-Neutrality-First-Amendment-Rhetoric-in-Search-of-the-Constitution.aspx.

430. *See, e.g.*, Kagan, *supra* note 27, at 464–65.

newspapers (including the *New York Times*) that do not own cable systems generally have editorialized aggressively in favor of network neutrality.[431] They would benefit from a legal standard encouraging, rather than impeding, such architecting.

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

This objection rests on understandable doubt regarding both legislatures and courts. Governments often try to suppress speech, as evidenced by cases here and abroad. Further, judges in the United States have often collaborated in suppressing speech; despite

431. Editorial, *Keeping the Net Neutral*, L.A. TIMES, Dec. 2, 2010; Editorial, *Net Neutrality Back in Court*, N.Y. TIMES, March 6, 2011, at A20.

"pathological" government distrust,[432] courts continue to uphold censorship, often in wartime.[433]

But in our venerable tradition, common-carrier rules have not resulted in a history of censorship.[434] When we also consider ownership limits, designated public forums, and most access rules, our tradition suggests that the courts have managed to limit the risk of censorship when government opens spaces for speech. Or, at least, the courts' record here is no better or worse than its checkered record elsewhere regarding censorship. 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.[435] 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?"[436] 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.[437] Moreover, a society with plentiful speech spaces for all speakers would support a democratic *culture* of speech, as Jack Balkin

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432. *See* Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449–50 (1985).

433. *See* sources cited *infra* note 437.

434. 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 Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126, 130-31 (1989).

435. *See* sources cited *infra* note 370.

436. LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 7 (1999).

437. *See, e.g.*, BENKLER, WHITE PAPER, *supra* note 405; *cf.* Gregory P. Magarian, *The First Amendment, the Public-Private Distinction, and Nongovernmental Suppression of Wartime Political Debate*, 73 GEO. WASH. L. REV. 101, 115–27 (2004).

has argued,[438] 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.

438. *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).