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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 of judicial doctrines in ensuring the availability of spaces for speech. Indeed, when scholarship addresses doctrines that are explicitly concerned with speech spaces such as public forums and media or Internet forums, it generally marginalizes these doctrines as “exceptions” to standard First Amendment analysis. By overlooking or marginalizing these decisions, scholarship has failed to explicate the logic underlying important doctrinal areas and what these areas reveal about the First Amendment’s normative underpinnings.

This Article adopts a different interpretive approach. It identifies and interprets the Court’s role in ensuring, requiring, or permitting government to make spaces available for speech. Across a range of physical and virtual spaces, the Article identifies five persistent judicial principles evident in precedent and practice that require or permit government to ensure spaces to further particular, substantive speech-goals.

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

Imagine an American, Ed, moves to another country. He gets involved in politics, perhaps to support a law that would legalize marijuana, perhaps to support a recall of the mayor. 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 discourage such activity. He would mail pamphlets, but postage is expensive and postal service extends only to a few big cities. He would take his cause to virtual spaces, such as the Internet, but the private Internet service providers exercise the right to block or impose surcharges on political websites and emails. He would use his phone to call potential supporters, but phone companies are not subject to U.S.-style “common carrier” rules that would require them to carry all calls without discrimination. He would turn to newspapers, but they can, and most likely will, decide not to publish what he writes; and they can turn down his advertising, even if he could afford to pay their rates. If he could afford to buy a newspaper company, he could not afford to buy the private streets on which to distribute them. He would turn to broadcast stations and cable channels, but he cannot afford their rates either, and no public access channels are available to the public.

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

While this hypothetical nation without speech-spaces is not the U.S., our nation would, in fact, resemble this nation if the Supreme Court adopts scholars’ “standard” model of the First Amendment. Grounded in venerable cases forbidding censorship, that model is concerned almost exclusively with ensuring

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

that speakers enjoy negative liberty—a freedom from government involvement in speech. The scholars’ “standard” solution in most cases is simple enough: government should stay out entirely.

Our nation is not Ed’s primarily because of what scholars consider to be judicial “exceptions” to standard doctrine. Those exceptions play an incredibly important role practically to ensure that Americans, including those that cannot afford media systems, can access spaces for speech. But scholarship treats the doctrines as a patchwork of sui generis exceptions, without unifying principles, few of which are justifiable.

Some exceptions, in fact, require access to spaces. Scholars consider the traditional public forum doctrine an “exception” to the standard model. This is an exception because it is concerned with more than negative liberty; it grants individuals affirmative access to some spaces, such as streets and parks. These spaces remain areas not only for crackpots, but also for politically consequential Tea Parties and teachers’ unions.

Far more exceptions are not judicially required, but are judicially permitted. That is, despite constitutional objections, government can pass laws providing access to additional spaces—both physical and virtual, on public and private property. These spaces include shopping malls, phone networks, cable networks, and wireless networks, among others. Despite the standard model’s requirement

4 See infra notes 100-107 and accompanying text.
7 See infra notes 114-115 and accompanying text.
8 For our purposes, “virtual” spaces are those that connect speakers through by a medium: a phone wire, a wireless signal, or the postal service. I am following a common convention in analogizing such mediums to forums or spaces. E.g., Jack 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 Cal. L. Rev. 521, 521-23 (2003).
that government not interfere with these speakers’ decisions and respect their negative liberty, judicial “exceptions” have permitted government interference to ensure access to these spaces. There are doctrinal exceptions for regulating access to phone systems, to broadcast systems, to cable systems, and to shopping malls, although different exceptions apply to each. It remains unclear which of these exceptions, if any, will apply to the increasingly dominant space for discourse—the Internet.

In sum, the doctrine is a messy collection of exceptions to a standard model that would otherwise require no affirmative access to spaces, nor permit government to open privately owned spaces to speech. With no remotely coherent alternative model, scholars urge the courts to accept the standard model.

The stakes of adopting the standard model are both timely and significant. Whenever the Court accepts the standard model, it can drastically limit the speech spaces available to average Americans, including on our most significant new spaces for speech. In December, 2010, the Federal Communications Commission adopted a “network neutrality” rule. This rule prohibits phone and cable companies from blocking, or discriminating among, websites and online software. That is, it aims to ensure that all Americans can access the “cyber”-spaces that are increasingly central to how Americans speak with friends, seek out information, and organize politically. Largely because of network neutrality’s role in ensuring access to Internet spaces, U.S. Senators and (some) scholars assert that network neutrality furthers free speech goals and is “the First Amendment issue of our time.”

The proceedings inspired involvement from over two million citizens, every major consumer group, civil liberties groups like the ACLU, and liberal and conservative churches; in March, 2011, two Senators observed that

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9 See infra notes 116-117 and accompanying text.
10 See infra notes 74-77 and accompanying text.
“[n]o other telecommunications issue has generated the same amount of public debate, legislative and regulatory action, and media attention as net neutrality,” that it was the “free speech issue of our time,” and so would remain “the subject of widespread public debate for years to come.”

But, to the standard scholarly model, network neutrality is a First Amendment issue only to the extent that the First Amendment should forbid the government from adopting this rule and making decisions about the speech of privately owned Internet service providers. It is a clear instance of government butting into speech where it should stay out. Indeed, several scholars raised this objection, including constitutional scholar Laurence Tribe, who filed a brief to the FCC. He argued that, while network neutrality might favor nice-sounding goals like equality and redistribution, any government action would conflict with “a central purpose of the First Amendment,” which is “to prevent the government from making just such choices about private speech.” Quite simply, the government must stay out entirely, even if it means well. Professor Tribe is not the only scholar making this argument.

The network neutrality rule has been appealed, and may eventually provide the Supreme Court with the opportunity to determine whether an exception, or the standard model, will apply to laws providing Americans access to speak on the Internet.

But the stakes of choosing the standard model are not limited to the Internet, however important the Internet has become for speech. The standard model would render a wide range of rules ensuring speech access unconstitutional. 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—would interfere with the phone

Ted Hearn, Cable, Phone, Net Companies Have Spent $110 Million This Year To Influence Telecom Reform. Was It Worth It?, MULTICHANNEL NEWS, Oct. 23, 2006, at 14.

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


18 Id. at 2 (emphasis added).

19 See infra notes 42-44 and accompanying text.

company’s speech discretion, inserting government bureaucrats into private speech decisions.\textsuperscript{21} Rules requiring cable companies to serve all local residents force them to speak to those they would rather avoid, imposing government values on private speech.\textsuperscript{22} 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 standard model, however noble the goal, these laws contravene the First Amendment’s central purpose.

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

In this Article, I propose a better model, one that seeks to identify and defend unifying principles across all the “exceptional” doctrines governing discursive spaces and to explore what those principles say about the First Amendment that the 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 free speech principles. While there are some outlier cases, these principles are reflected in considerable precedent and practice. This Article is the first to identify and trace several key principles that appear to animate the Court’s approach to making spaces available to the public. It follows in the tradition of other First Amendment articles’ grounding theory at least partially in providing a better model for a confused area of doctrine.\textsuperscript{23} It does

\begin{thebibliography}{99}
\bibitem{22} See infra note 324 and accompanying text.
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so partly to demonstrate that these principles should not be considered “exceptional” but as basic threads in the First Amendment’s fabric.

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

In addition to setting out this model and detailing evidence demonstrating that courts have implicitly followed it, I explore its normative implications. I demonstrate that these principles lead to outcomes furthering both democracy and autonomy. Further, while scholarship often debates important affirmative or egalitarian values in precedent, the analysis here suggests overlooked values, such as the value of legislative discretion in implementing constitutional norms as well as judicial concern with sufficiency, if not with equality.

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

I. Of Architecture, Constitutional Law, and the Standard Model

This Part primarily discusses previous legal scholarship about “architecture,” about constitutional law affecting architecture, and also about the First Amendment’s standard model.

A. Speech Spaces and Law

In relation to speech, I use the term “architecture” in a fairly narrow sense to refer to spaces, physical or virtual, which may be made available for speech.

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24 See infra notes 41-51 and accompanying text.
25 See infra notes 426-429 and accompanying text.
The legal literature uses the term “architecture” similarly, though perhaps more broadly, regarding constraints effectuated through the design of spaces—a design often influenced or backed by law.

Any legal scholar discussing the “architecture” and law, or who uses “architect” as a verb, must begin with Lawrence Lessig. In articles and a book, *Code and Other Laws of Cyberspace*, he proposes a “New Chicago School” concerned with constraints beyond “markets” and “law,” notably “architecture.” Lessig defines architecture as “the world as I find it, understanding that as I find it, much of this world has been made.” Like other constraints, architecture constrains, or “regulates,” people by making certain options more or less burdensome in light of other options. Speed bumps constrain architecturally to reduce speeds. Streetlights constrain criminals to reduce nighttime crimes.

Individuals generally perceive architecture as “an unalterable backdrop,” rather than a potential market transaction. Someone usually cannot buy her own road to avoid a speed bump or invest in her own phone lines to avoid discriminatory Internet access providers; nor can most people even afford alternative measures short of these investments.

At the same time, some organizations, including governments, do have sufficient power to affect architectures, from urban designs to media structures. In shaping architecture, government alters the power relations between citizens and the government, and among citizens. Law can empower citizens to speak freely at a shopping mall, or to access any site online, imposing constraints on the

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28 See Lessig, New Chicago, supra note 27, at 663.

29 For discussion of varieties of constraints, with sources, including subjective and objective constraints, see Lessig, New Chicago, supra note 27, at 675-79. See also sources cited supra note 1.

30 See LESSIG, supra note 1, at 128.


mall owner and phone company regarding the space, while conferring freedoms on others.

Constitutional law, like other law, can affect access to speech spaces. Thirty years ago, Justice William Brennan distinguished between two models of the free speech guarantee: a “speech model,” which concerned individual censorship, and a “structural model.” The structural model asked a question about the design of speech spaces—whether the First Amendment “protects the structure of communications necessary for the existence of our democracy.”

Dozens of speech scholars have debated constitutional questions regarding access to physical spaces. They do so primarily regarding the role of public forum doctrine in ensuring adequate speech spaces. Few defend the doctrine; some find it too speech-restrictive and deferential to government to silence individuals, while others find it not deferential enough to government management of its property. All sides seem to find it formalistic and incoherent.

Scholars also debate virtual spaces, particularly those relying on private property such as wires (owned by phone and cable companies) and wireless signals (licensed to satellite, broadcast, and phone companies). These virtual spaces are central to American discourse and liberty. They are generally subject to affirmative speech obligations through legislative, not judicial, decisions.

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36 See, e.g., Robert C. Post, Constitutional Domains: Democracy, Community, Management 199 (1995) (observing that the doctrine has “received nearly universal condemnation from commentators”).
37 See id. at 199-267.
39 See Post, supra note 36, at 199 (characterizing the doctrine as “a serious obstacle … to sensitive First Amendment analysis”) Massey, supra note 38, at 301-31; Zick, supra note 6, at 457 nn. 112, 115.
Among others,⁴¹ Chris Yoo⁴² and Laurence Tribe⁴³ have essentially argued that the Constitution forbids (and should forbid) the government from passing laws to ensure access to spaces owned by media and communications companies. “Access rules,” for example, which enable third-parties to speak through someone’s property impose speech burdens on the owners. These owners and their customers engage in speech; government should not meddle in speech. Such rules, like many of the other rules affecting these private speakers, are unconstitutional. Under the First Amendment, even laws designed to make spaces more participatory and open to all are unconstitutional.⁴⁴

On the other side of this discussion are scholars including C. Edwin Baker, Yochai Benkler, Jack Balkin, Lessig, and others.⁴៥ Baker has devoted three books

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⁴⁴ See also infra Part II.C.2

to analyzing how media architectures favoring multiple speakers, rather than a few powerful ones, promote substantive democratic and individual autonomy goals.46 Benkler, in an influential book and several articles, has argued that law can, and should, favor more decentralized and more non-commercial speech architectures.47 Balkin has 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.48 Lessig has discussed government discretion to adopt “architectures of freedom” or “architectures of control.”49 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.50 Mark Tushnet has set out a First Amendment “managerial model” that permits the legislature to increase the amount or diversity of speech.51

While these scholars have debated the question of architecture, both for judicially-required and judicially-permitted spaces, their arguments are believed to have little grounding in precedent. More importantly, those favoring government action to ensure all individuals have access to virtual spaces have not articulated clear constitutional guidelines for, and limits on, government’s discretion in pursuing this goal.

B. Constitutional Law and Information Policy

Constitutional law shapes architecture in two not entirely distinct ways: through judicial decisions and through legislative decisions permitted by the judiciary. While the role of judicial decisions in constitutional law is widely accepted, the notion that legislative decisions reflect constitutional law may meet some
resistance, as the judiciary is supreme in enunciating constitutional norms. The belief of judicial supremacy is perhaps strongest for freedom of speech. Indeed, we might be quick to classify some legislative decisions as belonging to a realm outside constitutional law, comprising “information policy,” postal policy, or common carrier policy, even if those decisions enormously impact Americans’ speech experience.

But, without questioning judicial supremacy, we can agree that legislative decisions reveal much about “constitutional” law for several reasons. First, what we categorize as “constitutional” law (rather than “criminal law” or “property law”) is a question partly of discourse. Litigants consistently bring First Amendment challenges to the laws discussed in the next part, whether they are “information policy” or not. While not all challenges reach the Supreme Court, federal appellate decisions provide persuasive evidence to policymakers who seek to increase access to spaces, and therefore have a real impact on American’s speech opportunities.

Second, 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. Decisions that uphold legislation clarify “constitutional” law for the First Amendment—or for the Commerce Clause. All passable judicial tests (by definition) must impose at least some mandatory requirements on government (or else government could not fail) and some discretion on other choices (or else government could not

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

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


56 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.


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

The nature of those requirements and subjects of discretion both constitute aspects of constitutional law. While some judicial decisions can require the availability of some spaces for speech (parks, streets), decisions often permit spaces be made available, subject to some constitutional constraints, such as content-neutrality.

Third, just as bargaining takes place in the shadow of law, legislating takes place in the shadow of constitutional law. Legislative decisions often reflect known constitutional constraints articulated by the judiciary, or reflect constitutional rights for which the legislature may confer the remedy. At times, the lack of a Supreme Court decision may, in fact, be evidence of a rule’s perceived constitutionality, as a challenge seems futile. Even the Court notes that the long-time acceptability of certain rules sometimes reflects at least a “constitutional practice” suggesting constitutionality.

Finally, scholars have argued that legislatures play an important role in entrenching and furthering constitutional norms, as “norm” entrepreneurs, and suppliers of remedies that courts cannot supply. As a result, permissible legislative actions may themselves reflect constitutional norms.

For these reasons, assuming judicial supremacy, I still conclude that both when the judiciary forbids some legislative options and when it permits others, “constitutional law” is involved, and this constitutional law shapes speech architecture.

C. The Standard First Amendment Model

While scholars have different views, we can sketch a standard model of the First Amendment in broad outlines that has fairly wide acceptance. With roots in Zechariah Chafee’s work in the 1920s, this model rests on descriptive and

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63 See also infra notes 388-393 and accompanying text (discussing rights under-inclusion and remedies).

64 This outline necessarily simplifies a difficult, complex doctrine. See, e.g., Tribe, supra note 2, at 220 (“[C]onstitutional protection of free speech emerges as a patchwork quilt of exceptions.”); Robert C. Post, Racist Speech, Democracy, and the First Amendment, 32 Wm. & Mary L. Rev. 267, 278 (1991) (“As any constitutional lawyer knows, first amendment doctrine is neither clear nor logical.”).
interpretive assumptions about precedent, though scholars naturally suggest normative preferences that seem to shape the model itself.65

The standard model, like many doctrinal models, begins with paradigm cases. From these paradigm cases, scholarship infers principles underlying them. Then, these principles are seen as the “core” principles underlying First Amendment doctrine generally, rather than underlying the selected cases. Armed with core principles, scholars can then normatively evaluate other cases, to determine if they conform to “core” First Amendment principles, derived from these select cases. As a result, normative analysis rests in no small part on selection of paradigm cases and interpretively selecting their core principles. In applying these principles, cases that fail to conform to them are “exceptional.”66

The standard First Amendment model selects as paradigm cases those involving government silencing an offensive of subversive speaker. This selection is evident both in casebooks and the cases that have primary place in scholarship.67 Generally, one imagines government silencing a dissenter,68 or a bigot,69 or a flag-burner.70 Of course, this dissenter is speaking some place, but that is usually less important in these cases than government’s disagreement with the speaker’s message or its paternalistic desire to protect others from the message.

From these offensive-speech cases, one can infer a set of principles. While these principles come at varying levels of abstraction, including a preference for democracy71 and/or72 autonomy,73 I focus here on more specific, “intermediate,”

67 See Ammori, Curriculum, supra note 40, at 97-122.
73 See BENKLER, supra note 45, at 165, 176-211; Richard H. Fallon, Jr., Two Senses of Autonomy, 46 STAN. L. REV. 875, 876 (1994) (“Autonomy, however, is a protean concept, which means different things to different people.”); see also id. at 880, 883-84, 890; Yochai Benkler, Siren Songs
or “middle-level” principles that are more administrable for analysis. These inferred, intermediate principles include: negative-liberty (either judicial or legislative), government distrust, value-neutrality, and anti-redistribution. At the same time, these four rest on a public/private distinction, often best conceived as tied to property rights. We can look at each in turn.

First, offensive-speech cases suggest a negative-liberty, a freedom from government action. Affirmative or positive liberties, provided by government as freedoms to particular outcomes, appear both unnecessary and unhelpful. In these paradigmatic backdrops, if government just leaves everyone alone, diverse speakers can speak, with inexpensive means including pamphlets, vocal cords, or even flags and disposable lighters. 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.

Indeed, negative liberty is very widely believed to be a, or the, core First Amendment principle. We can think of two forms of negative liberty, though


they are not mutually exclusive. Negative liberty may simply limit the judicial branch, forbidding it 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. Negative liberty may (also) forbid the political branches from imposing affirmative obligations through sub-constitutional law like legislation or rules, particularly when these obligations burden a private actor. For example, not only would judges not require access to shopping malls or Internet access networks, they would forbid legislatures from passing laws to supply that access.

Second, beyond negative liberty, scholars often infer government distrust, rather than reasons for government deference. In the paradigm cases, government is stifling criticism of its policies, and likely doing so to shield elected officials from criticism affecting potential reelection. With this electoral-entrenching incentive, and no need to intervene to ensure speech resources or diversity, government action should be distrusted. Stated differently, the judiciary should provide government little to no deference.

Indeed, the judiciary should fortify First Amendment doctrine to ensure that it forces courts to stand up to legislatures in “perilous times,” such as wartime, when they have historically succumbed and upheld censorship. This fortification strategy, sometimes called the “Pathological Perspective,” resembles the French Maginot Line, fortified for the eventual war with the Germans, though ultimately proving fairly ineffective. This strategy also has tradeoffs; it may too broadly eliminate discretion even when government motives and actions appear to advance free speech goals.

Third, the paradigm cases suggest judges should impose a broad value-neutrality on government. Government should not impose its values on private of expression ... as private, negative rights intended to shield individual autonomy against government regulation.”); 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.”); Frederick Schauer, Hohfeld’s First Amendment, 76 Geo. Wash. L. Rev. 914, 915 (2008) [Hereinafter Schauer, Hohfeld’s] (“[T]he prevailing doctrinal structure embodies a series of clear choices in favor of negative rights and against positive rights.”).

78 See Stone, Autonomy, supra note 75, at 1171.
79 See sources cited infra note 2.
81 See sources cited infra note 2.
speakers—who may choose to burn flags or protest funerals. Speakers, not government, should determine what speech is valuable.82

Fourth, 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.83

All these principles assume a public/private distinction generally tied to property rights.84 The goal of doctrine, after all, is to keep 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 apparent.

In theory, this sounds like a fabulous theory.

Armed with these principles, scholars select other cases (or case language) that reflect these principles. By reflecting the selected “core” principles, these decisions are not exceptions but exemplars. Some exemplars relevant here are Buckley v. Valeo,85 Miami Herald v. Tornillo,86 and Turner Broadcasting v. FCC.87 Buckley, in 1976, struck down a limit on individuals’ campaign finance expenditures.88 Buckley therefore protected the private speech market, properly reflected distrust of legislators’ entrenchment-motives, rejected value-judgments about wealthy people’s speech, and rejected redistribution. Indeed, this italicized phrase in Buckley, which has is often called a “canonical sentence”89 (though only a phrase) states:

The concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to secure the widest possible dissemination of information from diverse and antagonistic sources, and to

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82 See Redish & Kaludis, supra note 75, at 1108.
88 Buckley v. Valeo, 424 U.S. 1, 48-49 (1976) (internal quotations and citations omitted). It also upheld a limit on contributions, but for non-speech, corruption reasons. Id. at 23–29. The standard model suggest that part of the decision is wrong. See Sullivan, Two Concepts, supra note 75, at 167–170.
89 See Sullivan, Two Concepts, supra note 75, at 156.
assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.\textsuperscript{90}

While we will return later to this sentence’s second phrase, scholars interpret the first phrase to suggest that any “limits on speech” inspired by “redistributive” concerns are among a handful of “First Amendment sins.”\textsuperscript{91} Then-Professor Elena Kagan referred to this phrase simply as “Buckley’s antiredistribution principle,” and stated that it “has ramifications far beyond the area of campaign finance. It applies as well to a wide variety of schemes designed to promote balance or diversity of opinion.”\textsuperscript{92}

Kagan cites, as support for this principle’s ramifications outside of campaign finance, other exemplars—\textit{Miami Herald}, decided in 1974, and the dissent in \textit{Turner}, a case that reached the Supreme Court twice, first in 1994, then in 1997. \textit{Miami Herald} invalidated a state law conferring the right-of-reply to individuals attacked by a newspaper.\textsuperscript{94} That right-of-reply appeared to rest on affirmative, not negative, conceptions of the First Amendment, as it required legislated affirmative access to newspapers’ speech property. It also meant to redistribute speech power from powerful newspapers to individuals, reflected a value judgment about the desirability of such redistribution, inspired potential abuse by government (if not now, at least during perilous times), and violated the liberty of newspaper editors to speak as they wished through their property.

For many years, scholars interpreted both \textit{Buckley} and \textit{Miami Herald} broadly. It seemed \textit{Buckley} banned redistribution and \textit{Miami Herald} invalidated all rules providing access to another’s property for speech, whatever their mechanisms. Then the Court decided \textit{Turner}, and rejected these broad readings. \textit{Turner} upheld a statute that required cable operators (like Comcast) to carry local broadcast stations (like a CBS affiliate). In our frame, it provided broadcasters access to cable spaces. \textit{Turner} interpreted the \textit{Buckley} principle to condemn speech redistribution only when it is based on content-preferences.\textsuperscript{95} It interpreted \textit{Miami Herald} to condemn access rules only when access was a trip-wire, triggered by a speaker’s content.\textsuperscript{96} Meanwhile, \textit{Turner} upheld an “access” rule providing

\begin{itemize}
\item[Buckley v. Valeo, 424 U.S. 1, 48-49 (1976) (internal quotations and citations omitted).]
\item[Sullivan, \textit{Two Concepts}, \textit{supra} note 75, at 158.]
\item[Kagan, \textit{supra} note 23, at 464.]
\item[\textit{Id.} at 464-65.
\item[Miami Herald Publ’g Co. v. Tornillo, 418 U.S. 241, 256 (1974).
\item[This interpretation is not entirely persuasive, based on \textit{Turner’s} own narrow definition of content-preferences. \textit{Turner Broad. Sys., Inc. v. FCC}, 512 U.S. 622, 642-43 (1994) (\textit{Turner I}).]
\item[\textit{Id.} at 653–59. Other cases previously rejected this argument. \textit{See Pruneyard Shopping Center v. Robins}, 447 U.S. 74, 86-88 (1980).]
\end{itemize}
broadcasters (like NBC) access to virtual spaces available on cable platforms. The dissent, which Justice Kagan stated reflected the Buckley principle and standard model, would have gone farther and imposed strict scrutiny and prohibited government from granting broadcasters access to the cable operators’ property to speak.

Nonetheless, Turner’s primary opinion reflected the “standard” model in at least one way, which casts a shadow on legislated access to Internet spaces. The plurality in Turner II viewed the access law within the standard framework of government burdening some speakers (here, cable companies rather than dissenters or racists).

With both underlying core normative principles and core exemplar cases (and dissents), scholars can judge other decisions, even those that appear dissimilar from the initial censorship cases. Scholarship can conclude some case outcomes are problematic because they conflict with these “core” principles. Indeed, arguments for outcomes conflicting with these core principles cannot rest on “real,” as opposed to imagined, constitutional law. For this reason, descriptive and interpretive analysis takes on enough importance to warrant the effort of some of our leading scholars, like Chafee, Kalven, and Kagan. Normative principles can bootstrap out of this analysis, tethering particular normative principles to precedent and tradition. These principles are then useful for judging other principles and decisions, especially should other principles conflict with the venerable precedent.

We can look at one example of this model of analysis. Martin Redish and Kirk Kaludis published an article that argued access rules, such as access to cable systems or shopping malls, should be unconstitutional. Like other scholars addressing such questions, they rely consistently on arguments from supposed “core” principles to reject access. To refute the notion of government discretion to enact such access, they assert a conflict with the “core” principle of government distrust. To reject substantive preferences for ensuring all Americans can meaningfully contribute to discourse, they observe that government must “redistribute” speech resources to ensure all can contribute. But, they explain, that

98 Id. at 676–77 (O’Connor, J. concurring in part and dissenting in part).
99 See infra notes 355-364 and accompanying text.
100 Redish & Kaludis, supra note 75, at 1105-13.
101 Massey, supra note 38, at 332-33.
102 See sources cited supra note 23.
103 See Redish & Kaludis, supra note 75.
104 Id. at 1086–87 (“[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.”).
redistribution violates the “core” principle of value-neutrality: “substantively motivated expressive redistribution would clearly violate the epistemological neutrality that stands at the core of the right of free expression.”105 Indeed, they assert, “It is standard First Amendment thinking that … the right of free expression must be implemented on a value-neutral basis.”106 Quite simply, the First Amendment’s core principles refute the argument for access.

Laurence Tribe’s arguments against network neutrality, which we observed earlier, follow this method. Perceived core principles of value-neutrality and negative liberty forbid the rule: “In fact, a central purpose of the First Amendment is to prevent the government from making just such choices about private speech.”107

Scholars are not completely blind to exceptions in doctrine, and often set up an “alternative” model, one that might help explain exceptional decisions outside of “real” doctrine. While not identical,108 scholarly models are consistent in contrasting (exceptional) affirmative or equality visions with (operative) negative liberty visions. Kathleen Sullivan discusses an exceptional “equality” model and an increasingly dominant “liberty” model.109 Calvin Massey refers to an inoperative “affirmative theory” and an increasingly operative “negative theory.”110 Lillian BeVier refers to an affirmative “Enhancement Model” and negative “Distortion Model.”111 Daryl Levinson refers to “negative liberty and “civic republican” visions,112 and John Fee refers to “speech maximizing” and “anti-discrimination” values.113 All agree that concern with negative liberty, apparently both judicial and legislative, reflects the dominant model.

Beyond “exceptional” principles—affirmative, equalizing, enhancing—there are exceptional decisions.

As a practical matter, however, the exceptions to the standard model would strike most people as anything but “standard.” According to leading theorists,

105 Id. at 1087.
106 Id. Value-neutrality seems only to require inaction; not providing access reflects another value, a value against redistribution, which would violate value-“neutrality” if such neutrality required action.
107 Tribe & Goldstein, supra note 17, at 2.
108 Sullivan classifies a neutrality principle with the more affirmative vision, while Massey and BeVier classify neutrality with negative liberty. Sullivan, Two Concepts, supra note 75, at 146-155; Massey, supra note 38, at 313; BeVier Public Forum, supra note 74, at 102.
109 Sullivan, Two Concepts, supra note 75, at 146-163 (discussing these conceptions in light of campaign finance decisions).
110 Massey, supra note 38, at 309.
111 Bevier, Public Forum, supra note 74, at 101 (defining an affirmative model as “concerned with how much speech takes place in society and with the overall quality of public debate.”).
113 Fee, supra note 75, at 1107-9, 1113-16.
they include the “entrenched”\textsuperscript{114} traditional public forum doctrine, which requires government to open up particular government-owned spaces, from parks to public streets to spaces outside government buildings.\textsuperscript{115} At the same time, in addition to traditional speech spaces, newer speech spaces are also “exceptions.”\textsuperscript{116} Broadcasting, the nation’s primary news and entertainment medium for decades, is an exception to scholars’ standard doctrine, unable to be integrated into a doctrinal framework.\textsuperscript{117} Cable television, based on \textit{Turner}, is at least a partial exception; as Kagan suggests, the dissent, preferring to strike down the access rule, better conforms to the apparent standard model. Phone access regulation is an exception, subject to no standard of scrutiny regarding the burdens on phone companies’ speech and property rights, despite the phone’s importance as a speech medium. Access to the Internet, provided by both phone and cable companies, may be an exception similar to the phone exception or the (different) cable exception. The postal service’s enormous effect on newspapers, 

\textsuperscript{114} Massey, \textit{supra} note 38, at 313; BeVier, \textit{Public Forum}, \textit{supra} note 74, at 113-114.

\textsuperscript{115} See, e.g., BeVier, Breyer, \textit{supra} note 75, 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, \textit{supra} note 38, 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, \textit{Hohfeld’s, supra} note 75, at 915 (noting “perhaps the significant exception of the public forum doctrine” to a negative-liberty rule); Kathleen M. Sullivan, \textit{Constitutionalizing Women’s Equality,} 90 \textit{Cal. L. Rev.} 735, 759 (2002) (“The American constitutional tradition generally provides for negative rights only, and excludes positive rights (with limited exceptions, such as the First Amendment’s effectively compelled subsidy of speech in the public forum).” See also Guy E. Carmi, \textit{Dignity--The Enemy from Within: A Theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification,} 9 U. PA. J. \textit{Const.} L. 957, 960, 986, 995 (2007) (“The First Amendment is distinctly perceived as protecting a negative right. ... There are slight exceptions to this rule such as the Public Forum Doctrine ...”); Alan Trammell, Note, \textit{The Cabining of Rosenberger: Locke v. Davey and the Broad Nondiscrimination Principle that Never Was,} 92 Va. L. \textit{Rev.} 1957, 1962 (2006) (“The public forum doctrine is an exception to the axiom that the Free Speech Clause confers only negative rights.”).


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.\footnote{Copyright is also an exception, violating Buckley anti-redistribution phrase, as it redistributes speech power and silences some for the benefit of others. See Tushnet, supra note 116, at 35–47, 60–63.}

Scholars sometimes suggest that the principles invoked in exceptional decisions are just as wrong as the holdings, which does not necessarily follow. A famously exceptional opinion is Red Lion Broadcasting v. FCC,\footnote{395 U.S. 367 (1969).} which held that, in light of technology and the government’s role in architecting broadcasting, government could impose the same kind of right-of-reply on broadcasting that was rejected for newspapers in Miami Herald.\footnote{Id. at 386-91.} This case rested partly on the speech interest of ensuring viewers and listeners received “information from diverse and antagonistic sources,” something the Court has repeatedly endorsed.\footnote{See, e.g., Associated Press v. U.S., 326 U.S. 1, 20 (1945); Ammori, Curriculum, supra note 40, at 119-20 (discussing a treatise’s treatment of Associated Press).} Indeed, perhaps because of the infamy of Red Lion’s holding, some scholars (and Justices in dissent) have argued an interest in diverse-sources conflicts with the First Amendment and should trigger strict scrutiny.\footnote{See, e.g., Turner I, 512 U.S. 622, 677, 688 (1994) (O’Connor, J., dissenting) (taken together, “[p]references for diversity of viewpoints, for localism, for educational programming, and for news and public affairs,” aim to produce an “informed electorate”).} While I do not defend Red Lion’s holding, it is primarily because the law at issue appears not to have furthered the invoked principles.\footnote{See infra Part II.C.1.} This is a common enough failing even in core cases; one does not discard intermediate principles like content-neutrality merely because the Court applied the principle wrongly in a few decisions.\footnote{See United States v. O’Brien, 391 U.S. 367, 376–77 (1968) (applying content-neutral test to law likely designed to target content).}

Finally, the standard model emphasizes that the doctrine is incoherent and confusing regarding exceptions for privately owned spaces, including different technologies.

We can now return to the patchwork of exceptions in more detail.

First, communications by wire traditionally included phone service, which received minimal to no scrutiny when government required those spaces open for all,\footnote{See Ichiel de Sola Pool, Technologies of Freedom 2 (1983).} though not when government regulated its content.\footnote{See Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126, 130-31 (1989).}
Second, the scrutiny for private, physical, spaces like shopping malls seems similar, without a minimal burden test.127

Third, radio and television broadcasters can be regulated subject to a “minimal” scrutiny128 associated with Red Lion.129 While Red Lion governs laws to ensure access for third-parties to broadcast spaces, the Court has held that standards for broadcast indecency rest on an entirely separate rationale in another Supreme Court decision.130 The D.C. Circuit, which hears numerous First Amendment challenges to communications regulation, has articulated the Red Lion standard as a principle rather than a standard of scrutiny: to be constitutional, broadcast regulation must further “the widest dissemination of diverse and antagonistic sources.”131 In that Circuit, satellite broadcasting also receives the Red Lion standard, though the Supreme Court has not spoken to the issue.132 As this standard appears tied to wireless frequencies,133 other wireless technologies may be subject to it, including allocations, assignments, and license conditions from wireless Internet service to “mobile television.” For this reason, reversing Red Lion would affect all of wireless regulation (except the long-repealed fairness doctrine), sending it into unchartered constitutional territory.134 But it would affect only those technologies.

Fourth, television delivery by wire (owned by a cable or phone company) is subject to a standard articulated in Turner, which arguably imposed a minimal burden test. That test, however, applies with widely varying ferocity, from a Turner-lite to a Turner-fierce.135 In keeping with Turner’s view that access rules burdened particular speakers, the Court required government not to “burden substantially more speech than is necessary” to advance the government’s important interests (in furthering diverse sources and universal access to

131 Time Warner Entm’t Co. v. FCC, 93 F.3d 957, 975 (D.C. Cir. 1996) (“Broadcasting regulations that affect speech have been upheld when they further this First Amendment goal.”).
132 For satellite, there is a circuit split. Compare Time Warner, 93 F.3d at 974-77 (applying Red Lion to uphold 3% must-carry set-aside for noncommercial stations on satellite) with Satellite Broad. & Commc’ns Ass’n v. FCC, 275 F.3d 337, 352-65 (4th Cir. 2001) (applying Turner to uphold satellite must-carry regime).
speech). As a result of this framework, cable companies assert First Amendment arguments against government meddling in the speech market for everything from rate regulation to ownership limits.

Fifth, newspapers are believed to be treated as “speakers” no less than a pamphleteer, though the Supreme Court has upheld some ownership limits and assumed the constitutionality of rules affecting what was long their primary means of reaching readers—the postal service.

Finally, it is not yet settled where Internet spaces fit in. The FCC has chosen the phone standard, permitting wide discretion. So have some district courts, though others have not. While the Supreme Court has selected a standard for Internet indecency, indecency decisions are generally irrelevant for judicial standards concerning architecting.

With that core-exception model in mind, we turn to the assumptions holding the analysis together in order to reveal some of the model’s flaws. The core principles rest on two logical fallacies, one that is more forgivable for such doctrinal tasks (an is-ought fallacy) and one that can be more problematic (an inductive fallacy).

First, an “is-ought” fallacy involves arguing something “ought” to be because it “is.” For example, one may argue that because a law is constitutional, it should be constitutional. The is-ought fallacy, while not logically sound, is


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


139 See FCC, Open Internet, 2010 WL 5281676, at *43-115.

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

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

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

common for this kind of analysis. Scholars look at cases that they likely find desirable, and infer principles from those cases. If stare decisis suggests courts will follow that precedent, then inferred principles likely will affect future decisions. And if inferred principles derive from favored precedents, the principles likely should do so. While scholars propose normative defenses for inferred principles, the principles receive considerable authority merely by appearing to reflect preferred, paradigm cases in the precedent—that is, merely because of the “is.”

More importantly here, the standard speech model adds an inductive fallacy—inducing too generally from a small, selective sample. Selecting offensive-speech cases yields a small and deliberately homogenous set, resulting in a high likelihood of an inductive fallacy to the rest of doctrine.

If I am right that the model suffers from the 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.

Nonetheless, the current principles suggest that rules like network neutrality are unconstitutional for conflicting with “core” principles, as do media ownership limits, or proposed rules requiring phone companies not to discriminate among text messages.

II. The First Amendment’s Influence on Speech Architectural

This part traces five architectural principles through First Amendment precedent and practice. Some of these principles are explicit, repeatedly invoked in decisions, while others are more implicit. Though other principles exist,
and the government mechanism chosen affects constitutionality, we learn much from tracing through and recognizing the significance of a principle—here five—in precedent.

The first is judicially required, but the others are all judicially permissible.

1. *Sufficient, required spaces:* The judiciary requires that individuals have some basic, adequate, spaces for autonomy and public discourse necessary in a democracy.

2. *Designated, additional spaces:* Beyond these spaces, the judiciary permits government to open additional spaces for speakers, whether those spaces are publicly owned or privately owned, and whether for all speakers or particular classes of speakers.

3. *Diverse and antagonistic sources:* The judiciary generally permits government to shape speech spaces so that speakers in those spaces have access to diverse sources of speech.

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

5. *Universal spaces:* The judiciary permits government to ensure that legislatively determined “necessary” speech spaces are extended for all Americans, including those in rural and impoverished areas.

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

A. Organizing Distinctions

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

1. Lumping

For commonalities, I lump together laws for several spaces often believed to have very different doctrine—private and public, physical and virtual, spaces


using differing technologies, and some spaces governed by different doctrinal categories.

First, I lump spaces on privately owned and publicly owned property. The principles identified generally distinguish between these spaces far less than assumed. For example, I lump designated public forums (publicly owned) and access rules to shopping malls (privately owned); I also lump traditional public forums (publicly owned) and access to equivalent forums in privately owned company towns (privately owned). Supreme Court Justices have likened access rules to private communications infrastructure to limited public forum doctrine; two Justices argued in a concurrence that limited public forum doctrine should apply to virtual spaces on cable, and apparently, phone systems even though they are privately owned.\textsuperscript{151} As we see, public or private, the same principles often apply.\textsuperscript{152}

Second, I lump physical and virtual spaces. This lumping also reveals overlooked commonalities. We can lump, with similar doctrines for an architectural principle, postal carriage of newspapers (virtual, public) and cable carriage of broadcast signals (virtual, private). The different doctrines often lead to the same place for the same reasons.

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

Finally, and suggested above, I lump together some issues that have been discussed such as limited public forum, subsidized speech, or telecom access rules. Others have already noticed the doctrinal similarities between limited public forums and subsidized speech, such as the apparent acceptability of subject-matter distinctions.\textsuperscript{153} Some have tried to justify broadcast access rules based on these doctrines.\textsuperscript{154} But all of these areas have resulted in deep scholarly and judicial

\begin{itemize}
\item \textsuperscript{154} See, e.g., Charles W. Logan, Jr., Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation, 85 CAL. L. REV. 1687, 1741-42 (1997).
\end{itemize}
confusion, so they do not help determine outcomes much more easily. Further, one could tie any regulation to government property—such as broadcast licenses, cable rights of way, and phone company rights of way.

2. Splitting

To reflect important distinctions, I split constitutional versus optimal and speech versus space.

First, whether a law is constitutional is distinct from whether it is 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. A range of access laws might be permissible, even if not required. So, “imperfect,” and even “bad,” laws are not always unconstitutional.

Second, whether the First Amendment protects speakers or speech. Judges distinguish between speakers and spaces. When governments regulate privately owned spaces, the owners object that government is censoring them as “speaker,” rather than merely making spaces available for many speakers. That owner often asserts that access for others’ speech compels the property owner to carry speech with which he disagrees, and abridges her “editorial right” to choose the speech carried on her property.

Rather than proposing a test to “split” spaces and speakers, we need only recognize that the need to make this distinction does not sink the notion of architecting. Courts (and agencies) often manage to address this question, looking to contextual factors, including the owner’s actions, regulatory history, and our collective norms and understandings about spaces and speakers. Where a space has been opened to many other speakers voluntarily and few would assume that

156 See, e.g., Schauer, Hohfeld’s, supra note 75, at 932.
others’ speech reflects the owner’s views, generally the legislature can treat the property as a space.\textsuperscript{159}

Scholars debate this question in literature, in courts, in Congress and in federal agencies, particularly because our society provisions basic speech infrastructure primarily through private companies, rather than government agencies. Returning to our example, the FCC-imposed “network neutrality” rules, scholars assert that the rule burdens cable and phone companies as speakers, interfering with their “editorial discretion” to select the speech on their systems (or, according to the FCC, block and discriminate against websites). The FCC concluded that cable and phone companies acted more as conduits, or spaces, than as speakers when they offer access to the Internet.\textsuperscript{160} Partly as a result, the FCC has twice concluded network neutrality does not, and should not, trigger heightened First Amendment scrutiny.\textsuperscript{161}

B. Five Architectural Principles

This section aims more for sweep and scope. As a trade-off, it must at places provide less explanatory depth. 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—these cases are “exceptions” that must invariably yield to speech doctrine’s “core” principles.

1. Sufficient, Judicially-Affirmative Spaces

Judicially required spaces are “exceptions” or “outliers” by any measure, but they provide a measure of space for autonomy, discourse, and basic democratic functions.

\textsuperscript{159} See Pruneyard Shopping Center v. Robins, 447 U.S. 74, 85-89 (1980) (considering several factors, including that the shopping mall was commercial, open to others, and that few would attribute customers’ views to the mall owner); Robert Post, \textit{Recuperating First Amendment Doctrine}, 47 STAN. L. REV. 1249, 1252 (1995) (discussing the importance of social context to speech analysis). Cf. Redish & Kaludis, \textit{supra} note 75, at 1127–28 (discussing this issue as a “gatekeeper dichotomy”). These answers may change. See Burt Neuborne, \textit{Speech, Technology, and the Emergence of a Tricameral Media: You Can’t Tell the Players Without a Scorecard}, 17 HASTINGS COMM. & ENT. L.J. 17, 21, 27 & nn. 16-19 (1994) (discussing printers).

\textsuperscript{160} See FCC, \textit{Open Internet}, 2010 WL 5281676, at 42. These companies may act as speakers when they take out advertisements or establish websites. \textit{Id.} Websites are better analogized to parcels, Internet access to postal carriage. Cf. Pacific Gas & Electric v. Public Utilities Commission, 475 U.S. 1, 9 (1986).

\textsuperscript{161} See FCC, \textit{Open Internet}, \textit{supra} note 12, at *49, 79–80 (rejecting arguments in Tribe & Goldstein, \textit{supra} note 17, at 3-4).
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. The home reflects the need, articulated by Robert Post and others, that a democracy must respect individual autonomy—a space for reflection and analysis ensuring that individuals have a buffer between the self and the “public sphere” or government.

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

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

While government can often regulate speech by content-neutral means, it often cannot regulate speech this way when projected from private homes. In City of Ladue v. Gilleo, the concurrence complained that the Court did not even bother to apply the traditional test.

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

164 See Post, supra note 72, at 1115-23 (1993); see also Michael Adler, Cyberspace, General Searches, and Digital Contraband: The Fourth Amendment and the Net-Wide Search, 105 YALE L.J. 1093, 1110 (1996)

165 Cf. Fee, supra note 75, at 1109 (identifying a zone of protection where speech rights “cannot be reduced, whether or not government restricts all speech equally”); see also id. at 1164-65.


167 Id. at 568.


171 Id. at 59–60 (O’Connor, J., concurring).
At the same time, government can silence others hoping to speak at the home with more discretion than elsewhere. Explicitly based on the right to quiet enjoyment and reflection at home, the Court has upheld government laws limiting picketing in front of the home,\(^{172}\) offensive mailings,\(^{173}\) offensive radio broadcasts,\(^{174}\) and offensive sound trucks.\(^{175}\) Government can even empower citizens to turn away door-to-door advocates by posting a notice in their windows.\(^{176}\) Meanwhile, the Court has repeatedly emphasized, regarding other, more public, communicative spaces such as traditional public forums, that the government cannot shield listeners from unpleasant speech, ranging from flag burning in public to jackets decorated with F-bombs at courthouses.\(^{177}\)

These “exceptions” point in the same direction: this space receives special protection, insulated somewhat from government meddling and public speech.

b) Spaces for Discourse

The second judicially-affirmative space consists primarily of “traditional public forums” and their equivalents on private property. Like the home, the doctrines making these spaces available are “exceptional.” These include public parks, streets, and squares. These “exceptional” physical spaces of traditional public forums (especially added to the space for people’s homes) are significant both in terms of the population using them and the spatial area they cover.\(^{178}\)

Unlike most other spaces, traditional public forums generally cannot be closed off entirely to public speech. In \textit{Hague v. Committee for Industrial Organization},\(^{179}\) decided in 1939, the Court struck down an ordinance forbidding pamphleteering “on any street or public place.”\(^{180}\) The Court also struck down laws banning pamphleteering in public places.\(^{181}\) Similarly reflecting an architectural perspective, any restriction that is not a “ban” must, among other things, leave “open ample alternative channels for communication.”\(^{182}\) The ample-

\(^{174}\) FCC v. Pacifica Foundation, 438 U.S. 726, 748-749 (1978)
\(^{175}\) Kovacs v. Cooper, 336 U.S. 77, 86-87 (1949).
\(^{178}\) All public streets, including residential ones, are traditional public forums. \textit{Frisby}, 487 U.S. at 481.
\(^{179}\) 307 U.S. 496 (1939).
\(^{180}\) \textit{Id.} at 501, 516.
\(^{182}\) \textit{Perry Educ. Ass’n}, 460 U.S. at 45, 56 (emphasis added).
channels requirement, which is not found in other intermediate speech tests, is concerned not with censorship but with the architectural concern of ensuring sufficient speech spaces.

Together they suggest that some minimal spaces, perhaps sufficient for some speech purpose, must be available.

Yet, this principle is not limited to publicly owned property. In another “outlier” reflecting the same principle, the Court required apparently identical minimal access even for privately owned property when such spaces would not have been otherwise available. In Marsh v. Alabama, decided in 1946, the Supreme Court concluded that streets in a company town must be treated like traditional public forums. Marsh is an outlier, but in the same way as public property, demonstrating a broader point about speech spaces: in any town, private or public, the streets and parks (but no more) must be available to speakers.

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 these spaces are not enough for all to contribute equally in our democracy, or perhaps even to contribute effectively at all. Rather, it seems we may have space sufficient, at least, to contribute to deciding whether opening additional spaces are 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. And, as we see, the government has often opened additional spaces for discourse.

Rather than ensure just enough space to trust public debate around opening additional spaces, perhaps the judiciary should simply determine how much space is sufficient for democratic debate generally. The judiciary, however, lacks the competence to determine which spaces are necessary—in Lincoln, Cambridge, or Ann Arbor. But the judiciary can make this determination indirectly. As recognized by John Fee, content-neutral requirements play an essentially affirmative role. As we will see in the next subsection, whenever government makes available spaces that are not mandatory, it must do so in an even-handed way, without discriminating against particular speakers or viewpoints. This requirement allows the judiciary to piggyback on government expertise; if government believes that some speakers need access to additional spaces, then all

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184 See infra notes 410-412 and accompanying text.
186 Id. at 506.
187 See Fee, supra note 75, at 1159–69.
similarly-situated speakers receive the same benefit, increasing the minimal spaces effectively available (by law) to 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.

That is, while the judiciary cannot determine how much space is sufficient for democracy, the mandatory streets and parks, and mandatory content-neutral requirements for opening additional spaces, enable the public to democratically determine how to architect speech spaces, and result in the judiciary being able to free ride on legislative decisions through the content-neutral doctrine for designated spaces.

c) Democratic Spaces

The “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.”

In terms of sufficient spaces for speech, congressional spaces are as necessary for democracy as mandatory protection for the homes of Americans.

2. Additional, Designated or Discretionary Spaces

The evidence for the second, likely controversial, principle is overlooked but voluminous.

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, as government must not punish or prefer messages through opening these spaces.

This observation comports with the observations of Elena Kagan, Mark Tushnet, and others that the judiciary often employs lower, “non-standard” scrutiny to government efforts to increase the amount of speech available to individuals—as evidenced by the doctrine of speech exceptions, speech subsidies, copyright, and other areas of doctrine. That principle also holds for speech 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. For example, if a user has unfettered access to Internet forums, the user likely does not care if a statute or court decision resulted in 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.\(^\text{190}\)

a) Physical Spaces: Publicly and Privately Owned

*Publicly owned spaces.* Government can open the physical spaces it owns through, among other doctrines, the designated public forum and limited public forum. Under public forum doctrine, government can, by choice, designate public spaces to speech, as “designated public forums.”\(^\text{191}\) Government need not designate them. While government has the discretion to open these spaces for speech, the court limits this direction; government must treat these spaces, once open, as it treats traditional public forums. Thus, content-based restrictions are subject to strict scrutiny, content-neutral to intermediate scrutiny.\(^\text{192}\) Governments have designated municipal theaters, school board meetings, or other public property.\(^\text{193}\)

Similarly, though more confusingly,\(^\text{194}\) *limited public forum* doctrine enables government to designate a forum not for *all*, but for “certain speakers, or for the discussion of certain subjects.”\(^\text{195}\) A limited public forum can be either a “place” or a (virtual) “channel of communication”\(^\text{196}\); it can even be “a metaphysical” rather

\(^\text{190}\) 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.”).


\(^\text{196}\) *Id.*
than a “spatial or geographic” space, such as a fund of money.\textsuperscript{197} Limited public forums include, among others, university facilities for student groups\textsuperscript{198} or open areas of school campuses.\textsuperscript{199} The applicable doctrinal test seems not to require subject-matter (or “content”) neutrality in selecting speakers,\textsuperscript{200} but does require viewpoint-neutrality.\textsuperscript{201} As a result, government can grant publicly owned spaces to particular speakers, the most well-known cases designating educational spaces to student groups.

\textit{Privately owned spaces.} Just as traditional public forums include the equivalent minimal \textit{private} spaces (the lesson of \textit{Marsh v. Alabama}), government can also designate private property, so long as the space is sufficiently open to the public and the government acts with content-neutrality.\textsuperscript{202} 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.\textsuperscript{203} But in 1980, in \textit{Pruneyard Shopping Center v. Robins},\textsuperscript{204} the Supreme Court unanimously held that states \textit{may} adopt legislation that opens up private shopping malls for speech, rejecting the mall’s speech claim.\textsuperscript{205}

\section*{b) Virtual spaces: Publicly and Privately Owned}

\textit{Government-owned.} Throughout most of its history, the U.S. postal network was the main space for mediated speech generally, and for the speech of newspapers specifically.\textsuperscript{206} Just as today, newspapers are available through cyberspaces, initially they were available through postal “spaces.” The postal

\begin{footnotes}
\footnotetext{197}{Rosenberger \textit{v. Rector and Visitors of Univ. of Va.}, 515 U.S. 819, 830 (1995).}
\footnotetext{198}{\textit{See} Widmar \textit{v Vincent}, 454 U.S. 263 (1981).}
\footnotetext{199}{\textit{Justice for All v. Faulkner}, 410 F.3d 760, 769-70 (5th Cir. 2005); \textit{Rohr, supra} note 194, at 38.}
\footnotetext{200}{The relationship between speaker-discrimination and content-discrimination is uncertain. \textit{Compare} \textit{Citizens United v. FEC}, 130 S.Ct. 876, 899 (2010) with \textit{id. at} 945 (Stevens, J., dissenting). \textit{See also} \textit{Fee, supra} note 75, at 1129-30.}
\footnotetext{201}{Oddly, reasonableness and viewpoint-neutrality apply to any forum, even a non-public forum, leading some to question the logic of this test. \textit{Rohr, supra} note 194, at 22.}
\footnotetext{202}{\textit{See, e.g.}, \textit{Pruneyard Shopping Center v. Robins}, 447 U.S. 74, 87 (1980); \textit{see also} \textit{supra} Part II.A.2.}
\footnotetext{203}{\textit{See} \textit{Hudgens v. National Labor Relations Board}, 424 U.S. 507, 520–21 (1976).}
\footnotetext{204}{447 U.S. 74 (1980).}
\end{footnotes}
network has been among our most important mediums, and the most important at our nation’s Founding. Constitutionally discretionary legislative rules, regarding access to postal spaces, protected and promoted newspapers’ speech even more than judicial doctrine for most of our history.

Since before the Constitution and well into the 20th Century, the “post office and press working together,” were “intertwined” as one “major communication system.” 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. To this day, in Justice Brennan’s words, the postal service is “a vital national medium of expression.” The postal network’s primary function was disseminating newspapers, rather than letters; government taxed letters heavily to subsidize newspapers. Many early publishers were postmasters, while postmasters often also served as unofficial subscription agents for newspapers, encouraging subscription to local papers, based both on custom and postal laws. The names of newspapers still reflect this relationship: the “evening post” or the “daily mail.”

Postal historians conclude that postal policy and rates are “best understood as expressions of social policy.” 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. Congress used the mailing system deliberately to promote publications discussing news and affairs. 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.” Genres and publications died and lived based on postal policy.

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207 See KIELBOWICZ, supra note 206, at 1-146.
209 KIELBOWICZ, supra note 206, at xi, 1.
210 Id. at 1.
212 See KIELBOWICZ, supra note 206, at 3; Kelly B. Olds, The Challenge to the U.S. Postal Monopoly, 1839-1851, 15 CATO J. 1, 5-7 (Spring-Summer 1995).
213 See STARR, supra note 11, at 55-58; KIELBOWICZ, supra note 206, at 13.
214 See KIELBOWICZ, supra note 206, at 43, 103.
215 See id. at 16.
216 Kielbowicz & Lawson, supra note 206, at 359.
217 See KIELBOWICZ, supra note 206, at 2.
218 See id. at 1, 3.
219 Id. at 2
220 See id. at 8 n.4, 129.
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.\textsuperscript{221} Indeed, Congress had to designate the forum in the first place; the Constitution does not require government to make postal spaces available,\textsuperscript{222} and the Court has determined postal spaces are a nonpublic forum unless designated otherwise.\textsuperscript{223} Moreover, the congressional policy of nondiscrimination, which opened spaces for all newspapers, specifically reversed pre-Constitution practice. Under that practice, postmasters would deny mail-access to competing papers, something Benjamin Franklin both experienced and then (when postmaster) exploited.\textsuperscript{224} Like cable operators of today, they could determine which speakers to carry or drop. During the Articles of Confederation, the Postmaster General would discriminate against some papers.\textsuperscript{225} In response, after Constitutional ratification, the first Congress fired the Postmaster and passed the first major Post Office act, removing postmasters’ discretion over admitting or denying newspapers.\textsuperscript{226}

To this day, political magazines still rely on low postal rates,\textsuperscript{227} and the postal network’s largest corporate client is Netflix, which distributes films and shows through both the Internet and the postal service.\textsuperscript{228} Needing access to both speech spaces, its government affairs staff is active on two legal issues: network neutrality and postal rates.\textsuperscript{229}

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\textsuperscript{221} See, e.g., Hannegan v. Esquire, Inc., 327 U.S. 146, 153–9 (1946) (holding that government could not make value judgments about the literature included into second class mail); Lamont v. Postmaster Gen., 381 U.S. 301, 305 (1965) (holding government could not require citizens to opt into receiving mail from political sources). Earlier decisions were less enlightened. See Rabban, supra note 23, at 27-32. See also Kielbowicz, supra note 206, at 121-29, 133-34; Starr, supra note 11, at 137, 161. Magazines also received privileges in the late 1800s, as did some nonprofits. Starr, supra note 11, at 261; Kielbowicz & Lawson, supra note 206, at 348, 352, 372-73.

\textsuperscript{222} See U.S. Const. Art. I, § 8, cl. 7 (empowering Congress “[t]o establish Post Offices and post Roads”).


\textsuperscript{224} See Kielbowicz, supra note 206, at 16, 19.

\textsuperscript{225} See id. at 23-24.

\textsuperscript{226} See id. at 32. There were some abuses, nonetheless, mainly by Federalists. See id. at 40-42.


\textsuperscript{228} 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/.

\textsuperscript{229} Interview with Michael Drobac, Netflix Director of Government Relations, in Las Vegas, Nev. (Jan. 11, 2011).
Privately-owned. Government has effectively designated several virtual spaces on privately owned infrastructure, just as it has, and can, designate shopping malls and 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, for a nondiscriminatory fee. A phone company is a common carrier, accepting all callers for a fee. A newspaper is not a common carrier, and need not accept a speaker’s money to carry her speech.

*The Telegraph-Newspaper Network:* The government’s initial lack of telegraph regulation resulted in “an unprecedented private monopoly in the national distribution of news” that lasted decades. By the early 20th Century, government policy ensured nondiscriminatory access to telegraphic spaces, despite the burdens imposed on the speech choices of telegraph companies and newspapers contracting with them.

Because of its role in disseminating news, the now long-forgotten telegraph became “the first national medium of mass communication” after the Post Office. Samuel Morse invented the telegraph in 1832, and, by 1844, presidential candidate Henry Clay expressed concerned that private owners of the telegraph could use it to “monopolize intelligence.” The telegraph was left, however, to the private sector without any access rules. The private telegraph industry relied on, and overlapped with, the newspaper industry because telegraph-use was so expensive that customers were limited to press, not individuals. In the 1840s, leadership of telegraph companies came from the press and Post Office, private investment also came from the press, and employees overlapped, as local reporters were often local telegraph operators.

Without an access rule for telegraph spaces, a bilateral monopoly developed in news and distribution, reflecting the risk of government failing to

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231 See STARR, supra note 11, at 154.
232 See id. at 178.
233 See id. at 163.
234 See id. at 163-65 (asserting mainly for fiscal reasons).
235 See id. at 177.
236 See id. at 169.
237 See id. at 170.
238 See id. at 185 (discussing the Associated Press and Western Union).
architect spaces to ensure broad access. The telegraph industry moved from 50 companies in 1851 to only one by 1866—Western Union—partly through mergers.\footnote{See id. at 166, 173.} 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.\footnote{See id. at 175} For this business model, the AP had exclusive deals with telegraph companies, which eventually merged into Western Union. As a result of this exclusive deal with a now-monopoly, it could deny some rival news services and rival papers access to telegraph communications with, for example, Europe, to collect international news.\footnote{See id. at 174. I refer to predecessor organizations, including New York Associated Press, simply as AP.} The AP also had exclusive deals with \textit{newspapers}, so it could lock out other news services and other telegraph companies.\footnote{See id. at 185. There was no federal antitrust law; the Sherman Antitrust Act passed in 1890, decades later.}

This bilateral monopoly was an architectural result that many would deem undesirable for a democracy. It had the power deliberately to swing the contested 1876 election for Rutherford B. Hayes, an outcome that ended Reconstruction.\footnote{See, e.g., TIM \textsc{wu}, \textsc{the master switch: the rise and fall of information empires} 22-25 (2010).} But as discussed earlier, according to the standard model, the First Amendment should place enormous constitutional hurdles to breaking open this news monopoly through telegraph access rules.

Eventually, 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.\footnote{See \textsc{starr}, \textit{supra} note 11, at 188.}

\footnote{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. \textit{See}, e.g., JONATHAN \textsc{e. nuechterlein} \& PHILIP \textsc{j. weiser}, \textit{digital crossroads} 360--84 (2005).} 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.
Resembling a designated public forum, 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.\textsuperscript{246}

Resembling a limited designated forum, states can require cable systems to offer access to three sets of speakers: “public access” channels, for any resident, and educational and governmental channels.\textsuperscript{247} Upheld by the D.C. Circuit,\textsuperscript{248} Justices Anthony Kennedy and Ruth Bader Ginsburg argued that public access channels should be treated as designated public forums, even though the spaces are on privately-owned cable systems.\textsuperscript{249}

Third, Congress required cable operators to carry local broadcasters, like NBC and ABC affiliates, and Supreme Court rejected a First Amendment challenge to the requirement in \textit{Turner}.\textsuperscript{250}

*Access to satellite spaces:* Congress has constitutionally directed 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.\textsuperscript{251}

*The Phone System:* Beyond indecency decisions,\textsuperscript{252} speech scholars often overlook the importance of the telephone network for speech, perhaps because the phone network did not historically support “mass” media or “press.” Yet the press and mass media receives no special protection under the Speech or Press Clauses, so the constitutional practice around phone systems reflects First Amendment doctrine, whether concerning speech or “press.”\textsuperscript{253} Since 1876, phone service is at least as central to American speech as pamphleteering.\textsuperscript{254} 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.\textsuperscript{255} Further, for the past two decades, phone companies have consistently

\begin{footnotesize}
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\item \textsuperscript{246} See Time Warner Entm’t Co. v. FCC, 93 F.3d 957, 968-71 (D.C. Cir. 1996). The Supreme Court, however, permitted governments to exempt some speech from this requirement, which would be unconstitutional on limited public forums. See Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 791-92 (1996) (Kennedy, J., concurring in part and dissenting in part).
\item \textsuperscript{247} 47 U.S.C. §§ 531, 541 (Westlaw 2011).
\item \textsuperscript{248} Time Warner Entm’t Co. v. FCC, 93 F.3d 957, 971-73 (D.C. Cir. 1996).
\item \textsuperscript{249} Denver Area, 518 U.S. at 791-92 (1996) (Kennedy, J., concurring in part and dissenting in part).
\item \textsuperscript{251} Time Warner Entm’t Co. v. FCC, 93 F.3d 957, 975-76 (D.C. Cir. 1996).
\item \textsuperscript{252} See Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 129–31 (1989).
\item \textsuperscript{253} See, e.g., Citizens United v. FEC, 130 S.Ct. 876, 943–44 (2010).
\item \textsuperscript{254} See, e.g., Ammori, \textit{Curriculum}, supra note 40, at 61.
\item \textsuperscript{255} Indeed, for decades, AT&T was the world’s largest company. See Peter W. Huber et al., \textit{Federal Telecommunications Law} 16-17 (2d ed. 1999). See also Baker, \textit{Turner}, supra note 45, at 94–99 (discussing telephone regulation in the context of free speech doctrine).
\end{itemize}
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asserted First Amendment claims against regulation and architecting, often with arguments crafted by leading constitutional scholars.256

Despite asserting such speaker rights, the courts generally treat regulation of phone companies to consist of regulating spaces. In 1910, despite the Lochner era culture, government imposed common carrier rules removing the phone carriers’ “editorial discretion” over speech on their lines.257 Later, government designated mobile phone spaces, extending common carrier rule to mobile phone calling.258

Indeed, phone companies rarely challenge rules requiring nondiscriminatory access when applied to their legacy voice service, as those challenges are universally believed futile. Rather, phone companies challenge similar regulations when applied to newer technologies, like their cable television offerings (with some success in lower courts259) and Internet service. The FCC recently imposed network neutrality rules on some of Verizon Wireless’s licenses, despite that company’s strenuous assertion to the FCC of a First Amendment right,260 before abandoning that assertion in court.261

*Access to the Internet:* Despite the mythology that government never “regulated” the Internet,262 government policy has been central to designating Internet spaces for all speakers.

Traditionally, without challenge, access rules were considered presumptively and easily constitutional. While scholars talk about the Internet as receiving “the highest” standard of constitutional protection based on the Supreme Court’s decision in *Reno v. American Civil Liberties Union*,263 that decision struck down a sweeping indecency law, dealing with a classic “censorship” issue. *Reno* says little about architectural speech issues. In fact, it *assumed*, as background, legal design: “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.”264 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

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256 See, e.g., sources cited in *supra* note 43.
261 See *Grant Gross, CTIA Drops Lawsuit Against FCC’s Open Access Rules, PC WORLD* (Nov. 13, 2008 4:00PM), http://www.pcworld.com/businesscenter/article/153848/ctia_drops_lawsuit_against_fccs_open_access_rules.html.
264 *Id.* at 870 (emphasis added).
speech. Even highly sophisticated speech scholars like Martin Redish overlook this fact, arguing that access rules are now unnecessary because of the Internet—which historically rested on access rules. If anything, he should argue the opposite, based on the Internet. As scholars have observed, Reno effectively invalidated a content-based restriction on a forum designated for speech by government.

Specifically, without constitutional objection, the government guaranteed access for all by common carrier regulation of phone spaces, as consumers could “dial-up” any Internet service provider. This included the right to dial-up an ISP (like Earthlink) that gave users access to the entire Internet, rather than an ISP offering access to a “walled garden,” or one preferred by the phone or cable company. Until 2005, the FCC required at least telephone companies offering high-speed DSL service to permit other ISPs. Since then, through policy statements, enforcement actions, and finally rules, the FCC has imposed network neutrality requirements, whose constitutionality are now subject to debate.

*Access to broadcast spaces.* While broadcasters have been subject to several access rules, some of which have troubling features, others have been generally accepted. In the more controversial Red Lion decision, the Court upheld access for personally attacked individuals. In another decision, the Supreme Court upheld an FCC rule designating “reasonable access” to broadcast spaces for federal candidates. 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.”

3. Diverse and Antagonistic Sources

The third principle may be the most controversial—that government can promote diverse and antagonistic sources in discretionary speech spaces. This

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265 See Redish & Kaludis, supra note 75, at 1084, 1130–31.
266 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.”).
267 In addition to dial-up, 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).
269 See FCC, Open Internet, supra note 12, at 77–82.
272 Id. at 396-97.
principle is more controversial among scholars than judges, though it has both
defenders and detractors in academia. 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 affirmatively to promote diverse sources in discretionary spaces.

Further, the Supreme Court has held that Congress and the FCC can further
diversification of sources based not on antitrust law but based purely on First
Amendment concerns.

Despite debate over the principle, it has considerable explicit and implicit
support in precedent over the centuries for every major communications medium.
In often-repeated language, the Supreme Court has repeatedly affirmed that the
“basic tenet” of the First Amendment is that our democracy rests on the “widest
dissemination of information from diverse and antagonistic sources.” This
“basic tenet” is a tenet not of censorship but of architectural design. Judge Learned
Hand has declared that we have “staked” our nation on this basic tenet and that
the interest of the First Amendment is not to protect newspapers’ interests as
speakers but to ensure “the dissemination of news from as many different sources,
and with as many different facets and colors as is possible.” The Supreme Court
similarly declared, in Turner, that “assuring that the public has access to a
multiplicity of information sources” is a “governmental purpose of the highest
order, for it promotes values central to the First Amendment.”

In permitting government to pursue diversity of sources, the courts have
not been insensitive to the concern of censorship. Their success in balancing
architecting and censorship may be no worse or better than its success in other
speech areas. But, in striking this balance, courts uphold two broad categories of
discretionary design rules as means of advancing diverse sources without much
risk of censorship based on message. They are access rules and ownership limits.

Access rules. As noted above, access rules provide additional, discretionary
spaces to speakers. Thus, compared to the lack of an access rule, they enable more
diverse sources speaking on the space. For example, carriage rules for

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273 See sources supra notes 23, 45, 75.
278 See sources cited supra note 2.
279 There is a debate over whether diverse sources lead to diverse views. See, e.g., BENKLER, supra
note 45, at 205-211; Daniel E. Ho & Kevin M. Quinn, Viewpoint Diversity and Media Consolidation:
 inexorably follows from consolidation.”). The courts generally assume a positive relationship
between the two. See, e.g., United States v. Associated Press, 52 F.Supp. 362, 372 (S.D.N.Y.1943);
telephone, telegraph, and Internet increase the diversity of speakers on virtual spaces. So did postal access rules which resulted in towns having multiple, independently owned newspapers well into the mid-19th Century, rather than just the postmaster’s preferred newspapers.\(^{280}\)

The same is true of the spaces available solely to particular speakers. Satellite access rules for broadcast stations and noncommercial channels, justified for furthering the basic tenet, have survived First Amendment challenge.\(^ {281}\) Cable access rules explicitly sought to further diversity of sources.\(^ {282}\) Indeed, Congress also required independent access in response to the concern for private censorship: “Congress thought cable operators might deny access to programmers if the operators disapproved the programmer’s social or political viewpoint.”\(^ {283}\) \textit{Turner} explicitly relied on the government’s interest in furthering diverse and antagonistic sources.\(^ {284}\)

\textit{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, burdening every person’s “speech” right to buy more outlets.\(^ {285}\) Companies often assert that ownership limits abridge their free speech rights, as they seek to buy more outlets “to speak” with more people.\(^ {286}\) Government imposed numerous ownership limits on broadcasting.\(^ {287}\) In the 1940s, the FCC limited consolidation in local FM, AM, and television service,\(^ {288}\) and required NBC to divest one of its two national radio networks (later ABC). The Supreme Court rejected NBC’s First Amendment argument.\(^ {289}\) In 1978, the Supreme Court unanimously upheld a rule forbidding newspapers from buying broadcasters in the same locality, explicitly holding that the ownership limits did not limit but instead \textit{furthered} First Amendment values—notably in the availability of diverse

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\item \(^{280}\) Until the 1880s and 1890s, for example, nearly all newspapers were independently not chain owned, and larger cities had many competitive dailies. See \textit{Benkler, supra} note 45, at 185-190; \textit{Starr, supra} note 11, at 252.
\item \(^{281}\) See \textit{Time Warner Entm’t Co., L.P. v. FCC}, 93 F.3d 957, 971-73 (D. Cir. 1996); \textit{Satellite Broad. & Commc’ns Ass’n v. FCC}, 275 F.3d 337, 351 (4th Cir. 2001).
\item \(^{282}\) See \textit{Cable Horizontal and Vertical Ownership Limits}, 20 F.C.C.R. 9374, 9376 (2005).
\item \(^{283}\) See \textit{Time Warner Entm’t Co. v. FCC}, 93 F.3d 957, 968 (D.C. Cir. 1996).
\item \(^{284}\) \textit{Turner I}, 512 U.S. 622, 663-68 (1994).
\item \(^{285}\) Prometheus Radio Project v. FCC, 373 F.3d 372, 401-02 (3d Cir. 2004).
\item \(^{286}\) See \textit{TWE-Fox Brief, supra} note 43, at 11-15.
\item \(^{287}\) The FCC’s policy has not always succeeded in fostering diversity. See, \textit{e.g.}, \textit{Robert W. McChesney, Telecommunications, Mass Media, and Democracy: The Battle for the Control of U.S. Broadcasting}, 1928-1935, at 18-22 (1994).
\item \(^{288}\) \textit{Prometheus Radio Project}, 373 F.3d at 383.
\item \(^{289}\) See \textit{Nat’l Broad. Co. v. United States}, 319 U.S. 190, 206-08, 224-27 (1943).
\end{itemize}
\end{footnotesize}
sources. To this day, limits on national and local television ownership remain, and the Third Circuit unanimously rejected First Amendment arguments in the latest appeal in 2003.

Cable television. While the D.C. Circuit once struck down an ownership limit in cable television based on Turner’s minimal burden standard, that court also upheld, against facial First Amendment challenges, statutory limits on horizontal ownership and vertical ownership. Congress justified these limits based on the goal of promoting diverse sources.

Satellite television. For satellite systems, the FCC has limited how much spectrum a satellite provider can buy at auction and blocked a merger of the two dominant satellite television providers, based partly of the concern for ensuring diverse speech sources.

Telephone. For the phone system, Congress imposed cross-ownership limits, forbidding phone carriers from holding broadcast licenses to reduce the likelihood of the phone company dominating speech. AT&T, then a near-monopoly phone provider, agreed to divest its telegraph lines in the 1913. In 1984, the Department of Justice broke up AT&T’s monopoly. This break-up resulted in local phone monopolies (such as Pacific Bell, Ameritech, BellSouth, SBC, and others) and one long-distance company retaining the name of AT&T. The local phone monopolies could not offer “information services,” which included a broad range of data services. For decades, their lawyers raised First Amendment objections to such rules. AT&T also could not offer “electronic publishing” services in the years following divestiture. In the 1982 opinion summarily upheld by the Supreme Court, the district court forbade the new AT&T from owning operations in “electronic publishing.”

291 Prometheus Radio Project, 373 F.3d at 401-02.
292 See infra Part II.C.2.
294 See Time Warner, 211 F.3d at 1316-21.
300 See, e.g., BellSouth Corp. v. FCC, 144 F.3d 58, 67-71 (D.C.Cir. 1998).
301 American Tel. & Tel. Co., 552 F.Supp. at 143, 180-86.
302 Id. at 180-190.
included, according to the court, news, entertainment, and both “one-way dissemination of information” and “interactive transaction services.” 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.”

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

Our government has “interfered” with the speech market to promote speech that unified disparate parts of the nation—nationalizing policies—as well as to promote spaces for distinctly local discourse. Legal scholarship has generally overlooked these numerous laws and policies.

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. 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 ensure both national and local spaces.

National Spaces. From the first Congress, postal policy has 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. 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. Second, coupled with exchange, as noted, the government invested heavily in postal roads to the most remote reaches of our nation, binding the nation in shared speech.

303 Id. at 181 n.207.
304 Id. at 185.
305 Ironically, as noted, scholars often argue that access rules may be unnecessary because of the Internet—though the Internet itself relies on access rules. See, e.g., Redish & Kaludis, supra note 75, at 1083.
306 See, e.g., DAHL, supra note 71, at 93-95, 106.
307 See, e.g., STARR, supra note 11, at 89–92; KIELBOWICZ, supra note 206, at 34.
308 For a discussion of revolutionary newspapers, see ERIC BURNS, INFAMOUS SCRIBBLERS passim (2006).
309 See, e.g., KIELBOWICZ, supra note 206, at 46.
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 (from, say, New York City) lacked.\textsuperscript{311}

Broadcasting policy similarly aimed to promote localism.\textsuperscript{312} Broadcast television licenses were assigned to locations with the primary goal of ensuring at least one local outlet for even small communities.\textsuperscript{313} The FCC also encouraged stations to cover matters of local concern.\textsuperscript{314} The FCC adopted—or relaxed—a range of broadcast ownership limits in an effort to increase the amount (or diversity) of local news coverage.\textsuperscript{315} The must-carry rules upheld in \textit{Turner} required cable operators to carry local broadcast television stations partly to further “localism,” as local broadcast stations are more likely than national cable channels to carry local news and affairs programming.\textsuperscript{316} Congress also effectively required national satellite broadcasters also to carry local broadcasters, partly for this reason.\textsuperscript{317}

With AM radio government sought to mix the availability of local and national speakers. AM radio has been around since the 1920s, while FM radio did not match AM’s popularity until the 1980s.\textsuperscript{318} In 1928, under General Order 40, the FCC divided up licenses into those serving local, regional, and (by night) national areas.\textsuperscript{319} 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 sought inexpensive local phone calling,
subsidized by “burdened” long-distance calls. Long distance calls used to be far more expensive than calling a neighbor.

All of these examples reflect government policy shaping the speech environment to promote national or local spaces.

5. Universal Access

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

Government’s discretion to extend spaces to all has a large and overlooked impact on American’s experienced ability to speak. The Supreme Court asserts that the First Amendment rests partly on the assumption that the “widest dissemination of information” is essential to a democracy. Fostering wide dissemination suggests making access to information more universal. Of course, judicially required spaces serve a universality role: streets and parks are largely universal, and they benefit all Americans, serving universality by disproportionately benefiting the “poorly financed causes of little people” who would otherwise lack spaces. But the government’s permitted role is significant.

These laws are more controversial than one would think, particularly when the law requires a company to serve all residents in a community, even the less profitable residents. Litigants have argued such laws “compel the speech” of cable companies, who must “speak” by building systems and providing service to rural and poor people they would rather not speak with. Some district court cases, though outliers, have in fact struck down rules requiring cable companies to serve all residents in an area.

Nonetheless, laws ensuring universal access are common and generally assumed constitutional.

Government use of public property for universal access is common and generally unchallenged. The postal service deliberately and expensively furthered universal access to newspapers, investing heavily in postal roads and post offices, criss-crossing the nation with more postal roads per capita than any other nation on earth. Government even “burdened” private speakers to ensure universality;

321 See NUECHTERLEIN & WEISER, supra note 245, at 339–43.
323 Martin v. City of Struthers, 319 U.S. 141, 146 (1943).
325 See KIELBOWICZ, supra note 206, at 46.
beginning in 1792, it forbade private individuals from entering the postal business,\textsuperscript{326} to reduce government’s cost of serving all Americans.\textsuperscript{327} The 1792 law permitted entry, however, where “mail is [not] regularly carried”—also in order to expand coverage.\textsuperscript{328} Partly because of such policies, by the early 1800s, newspapers “were more common in America than anywhere else.”\textsuperscript{329}

Federal and state governments also imposed obligations to further universality through other 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.\textsuperscript{330} 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.\textsuperscript{331} 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.\textsuperscript{332} Wireless phone service is also part of this system.\textsuperscript{333} Further the FCC’s procedures for granting cellular licenses had the “primary goal” of “nationwide availability of service.”\textsuperscript{334} Moreover, government routinely requires build-out of service to an entire service area.\textsuperscript{335}

For broadcasting, some examples include the television allocation plans in the 1950s, which prioritized rapid, universal deployment.\textsuperscript{336} First Amendment

\textsuperscript{326} See id. at 34, 84, 101 (noting that newspapers had a right to negotiate for private carriage and that government permitted private express carriers to send “urgent” mail).

\textsuperscript{327} See NUECHTERLEIN & WEISER, supra note 245, at 52-55 (discussing the economics of monopoly cross-subsidization).

\textsuperscript{328} See STARR, supra note 11, at 48.

\textsuperscript{329} By 1880, total US weekly circulation exceeded European circulation, even though Europe had ten times the US population. See id. at 87, 108, 240.

\textsuperscript{330} See id. at 171. By the early 1850s, almost every major city had telegraph service. See KIELBOWICZ, supra note 206, at 152.

\textsuperscript{331} See, e.g., 47 U.S.C. § 254 (Westlaw 2011); HUBER, supra note 255, at 531-590.


\textsuperscript{333} See HUBER, supra note 255, at 964-65.


\textsuperscript{335} See 700 MHz Auction, 22 F.C.C.R. 15289, 155348, 15543 (2007) (imposing strict performance requirements); HUBER, supra note 255, at 916 (discussing timed build-out requirements for narrowband and broadband PCS).

\textsuperscript{336} See sources cited supra note 313.
objections were not raised in the Supreme Court cases upholding the plan. 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) and the disabled (through closed captioning). 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. Congress requires state and city governments to ensure that cable is not denied any group based on income level, and localities generally require cable companies to serve the entire community. Finally, for Internet access, Congress has required the FCC to promote the deployment to all Americans, and directed the FCC to draft a plan to that effect. In the dial-up era, the FCC refused to cave to phone companies’ lobbyists and classify calls to Internet Service Providers as (then-expensive) long-distance calls, largely to ensure broader access of Internet spaces. The FCC is now transitioning the phone subsidy system to Internet connections.

Across the range of these laws, which rarely see constitutional challenge, government affirmatively furthers particular values, imposing private burdens, deliberately to “redistribute” speech power.

C. Outliers

As noted, scholars identify doctrinal principles through precedent, but “outliers” or “exceptions” generally exist. The exception may be justified or not, and can reveal either a difficult issue or a weakness fatal to the principles.

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339 See, e.g., Motion Picture Ass’n of Am., Inc. v. FCC, 309 F.3d 796, 807 (D.C. Cir. 2002) (discussing closed captioning rules).
344 See FCC, supra note 11.
345 NUECHTERLEIN & WIESE, supra note 245, at 297–301 (discussing the history and debate over this “ISP exemption”).
346 See, e.g., Connect America Fund, FCC 10-90, 2011 WL 466775, at *3, 6 (February 9, 2011).
Under the framework provided here, I argue two outliers appear unjustified: one a holding, one a standard. While Red Lion’s articulated standard is not aberrational, its holding is. While Turner’s holding is not aberrational, its formal judicial standard is, at least as it has been applied with considerable aggression by some lower courts.

1. Red Lion’s Holding

Red Lion, one of very many broadcast decisions addressing the constitutionality of particular laws and provisions, upheld FCC rules that required broadcasters to offer the right to reply and to provide multiple views on controversial matters of public importance. Issued unanimously the same Term as acclaimed cases like Tinker v. Des Moines Independent Community School District, Stanley v. Georgia, and Brandenburg v. Ohio, Red Lion has been the subject of scholarly and judicial criticism, and both rules it upheld have been repealed. Scholars believe that these rules burdened the broadcasters’ editorial discretion and that the fear of complaints likely resulted in less, not more, coverage of controversial matters of public importance.

Red Lion is an outlier because most rules discussed above do not punish or alter a speaker’s message. In Red Lion, the broadcaster’s chosen content triggers a punishment: the right of reply and the balance obligations. Usually, government does not include such a trigger. Chosen content does not trigger an ownership limit; these limits apply whatever the outlet says. Nor do common carrier or must-carry rules trigger an ownership limit. The Supreme Court distinguished Red Lion from the must-carry rules in Turner for this very reason. Whatever one thinks of right-of-reply rules, this distinction makes them at least a harder (or easier) case, compared to un-triggered rules discussed above. The principles enunciated in Red Lion, which run through access and ownership precedent across numerous spaces, remain central to the First Amendment.

354 Cf. News America Publ’g Inc. v. FCC, 844 F.2d 800 (D.C. Cir. 1988).
2. **Turner’s Standard in Lower Courts**

At the other end, *Turner* erects constitutional hurdles to ownership limits, access rules, and generally acceptable laws. As a result, *Turner* effectively acts to encourage narrow dissemination of information from less diverse and antagonistic sources.

*Turner* applied an intermediate scrutiny standard, borrowed from the test in *O’Brien v. United States* for expressive conduct, and combined that test with a substantial evidence requirement imported from administrative law. Under this combined test, government needs an important interest and narrow tailoring to that interest, backed with evidence demonstrating both.

The important interest is easy: an architectural principle will do. Indeed, in *Turner*, the two important interests were universal access of information and promoting access to diverse and antagonistic sources. The Court determined both interests were those of the “highest order” for furthering “values central to the First Amendment.” The Court also endorsed the interest of localism, without explicitly considering its “importance” under the test.

So far so good. Usually, where government promotes an architectural principle without content-based burdens or viewpoint-discrimination, government is in the clear. That is the lesson of the scrutiny applied for phone access regulation, Internet access regulation, the meaning of the *Red Lion* test according to the D.C. Circuit, and regulation formally under the limited public forum or subsidized speech tests.

*Turner’s* narrow tailoring prong, however, is aberrational. It requires government to further these interests—First Amendment interests of the highest order—without burdening “substantially more speech than is necessary to further the government’s legitimate interests.” A law might burden and benefit “speech” generally—in affecting the speech interests of broadcast viewers, broadcasters, cable viewers, programmers, and operators. But many courts and observers interpret the emphasized “speech” to consist only of the speech of the regulated cable and phone companies.

The *Turner* decisions, particularly in *Turner II*, applied the narrow tailoring prong quite weakly, suggesting this prong was not much of an obstacle. Indeed,

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357 See *Turner I*, 512 U.S. at 661–64; see also Note, *Deference*, supra note 53 at 2327-28.
358 *Turner I*, 512 U.S. at 663.
359 Id.
360 Id. at 665 (emphasis added) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)).
Justice Breyer’s fifth-vote concurrence noted “important speech interests on both sides of the equation,” rather than just on the side of cable companies, and suggested considerable deference for government to balance such interests when promoting diverse sources and universal access to information.\textsuperscript{362}

Some lower courts follow this weak application,\textsuperscript{363} but others have used \textit{Turner} to strike down horizontal and vertical ownership limits applying to cable television providers,\textsuperscript{364} and a rule that required phone companies to serve as common carriers for television content.\textsuperscript{365}

To this day, corporate lobbyists, as well as scholars, frequently invoke \textit{Turner} as a constitutional obstacle for what many would consider common sense: basic regulation to improve access for all Americans to speech spaces. \textit{Turner} is asserted against rules enabling individuals to choose their own cell phone;\textsuperscript{366} against the power to franchise cable operators;\textsuperscript{367} to require build-out to all citizens in a community;\textsuperscript{368} to impose common carriage on text messaging, rather than to let Verizon deny access for “controversial” abortion-rights speech.\textsuperscript{369} Broadcasters even urge courts to apply \textit{Turner}, rather than \textit{Red Lion}, when they challenge ownership limits because it would give them a better shot.\textsuperscript{370} Similarly, scholars and the industry assert \textit{Turner} applies to Internet access, including in every argument that network neutrality violates the First Amendment.\textsuperscript{371}

As a result of constitutional obstacles for ownership, access, and build-out rules, \textit{Turner} incidentally favors the narrowest dissemination of information from the least diverse sources. \textit{Turner}’s standard therefore is an outlier.

\textsuperscript{363} See, \textit{e.g.}, Time Warner Entm’t Co., L.P. v. FCC, 93 F.3d 957 (D.C. Cir. 1996).
\textsuperscript{364} See \textit{Time Warner}, 240 F.3d at 1137-40.
\textsuperscript{366} \textit{700 MHz Auction}, 22 F.C.C.R. 15289, 15294 (2007).
\textsuperscript{368} See, \textit{e.g.}, id.
\textsuperscript{369} See Comments of Verizon Wireless, \textit{supra} note 21, at 46-58.
\textsuperscript{370} Prometheus Radio Project v. FCC, 373 F.3d 372, 401-02 (3d 2004); Fox Television Stations v. FCC, 280 F.3d 1027, 1045-46 (D.C.Cir. 2002).
\textsuperscript{371} See, \textit{e.g.}, Tribe & Goldstein, \textit{supra} note 17, at 5; Yoo, \textit{supra} note 42, at 739-50; Randolph May, \textit{Time for the FCC to Respect the First Amendment}, INSIDERONLINE, Summer 2010, at 15-19; Kyle McSlarrow, Pres. of Nat’l Cable & Telecomms. Ass’n, Net Neutrality: First Amendment Rhetoric in Search of the Constitution: Remarks Before Media Institute (Dec. 9, 2009).
D. What Standard of Scrutiny Applies?

If *Turner*’s intermediate scrutiny standard should not apply, then what standard should when government is designating privately owned spaces rather than burdening speakers? The courts can merely determine whether the law (1) does not discriminate among messages or viewpoint, and (2) furthers one of the four principles. Courts can determine when this test applies, based on the parties’ claims, just as they can determine when the test for libel or copyright infringement should apply.

While this standard does not look like one of the “standard” scrutiny levels, it has several virtues. First, it avoids the danger of importing the wrong standard of scrutiny, while judges can more easily apply analogies to precedent based on the principles evident in analogous cases. Indeed, several Justices noted a preference for analogies over standards in a case involving complex cable access rules.

Second, tests other than scrutiny standards are often effective at serving particular goals. Libel against a public figure requires “actual malice,” speech calling for violence cannot be punished unless it “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action,” and threats can be regulated if they “communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” The D.C. Circuit even applies a principle—the basic tenet—to determine if laws affecting broadcast and satellite are constitutional. These are all principles rather than scrutiny standards.

Finally, using a principle to guide analysis may ensure more transparency than scrutiny standards. While standards appear to limit judicial discretion and avoid the substantive weighing of normative values, courts have considerable discretion to choose and to apply a standard based on largely unarticulated

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372 For this distinction, see Part II.A.2.  
373 *Cf.* Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 741-42 (1996) (Breyer, J., plurality opinion); id. at 777-78 (Souter, J., concurring) (endorsing the plurality’s use of analogies). But see id. at 784-88 (Kennedy, J., concurring in part and dissenting in part) (criticizing the plurality’s “evasion” of enunciating a standard).  
377 See Time Warner Entm’t Co. v. FCC, 93 F.3d 957, 974-77 (D.C. Cir. 1996).  
normative considerations. 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.

III. Normative Implications

As Part III demonstrates, speech architecture is an important force in First Amendment doctrine, and its role cuts across the full range of communicative spaces. This Part discusses the normative implications for First Amendment doctrine of taking the architectural principles into account, and provides a normative defense of those implications.

A. Reviewing Implications

Before providing a defense of the proposed model’s normative implications, we should review some of them.

The principles suggest that the First Amendment is concerned with the availability of speech spaces, and uses fairly consistent tests across different spaces, virtual or physical, public or private to ensure such spaces.

Doctrinally, it appears, so long as government acts even-handedly, government actions should be constitutional when they designate additional spaces for all speakers or broad classes of them; when they act to ensure diverse and antagonistic sources on such spaces; when they promote spaces for national or local speakers; and when they ensure speech spaces are available universally to all. Further, government must keep some spaces open for all—including ample alternative channels after content-neutral rules.

More abstractly, these principles suggest an important role for legislative action in furthering First Amendment goals. This insight diametrically conflicts with the most aggressive assumptions of the First Amendment’s concern for negative liberty. Nonetheless, in setting out the model, we have noted

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379 See Tribe, supra note 2, at 218 (noting some categorization “masks the essentially political nature of the underlying issues by pretending to cabin judicial discretion within the limits established by the category itself.”); Baker, Turner, supra note 45, 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 Analyses: Content and Context in First Amendment Adjudication, 70 Va. L. Rev. 1219, 1224 (1984) (arguing forum analysis has been “diverting attention from real first amendment issues”).

380 See, e.g., Time Warner Entm’t Co. v. FCC, 93 F.3d 957, 971-73, 974-77 (D.C. Cir. 1996) (upholding cable PEG as content-neutral, but relying on Red Lion to uphold the similar noncommercial access rule applying to satellite).
considerable support in the tradition for permitting legislative actions furthering these four goals.

B. Are the Implications Normatively Defensible?

These principles are normatively defensible. This defense relies on both more general principles and more specific outcomes. The principles identified are largely intermediate, middle-level principles, so I move up and down a level to evaluate them. In short, I argue that the normative implications lead to practical outcomes furthering the First Amendment’s more general principles.

First, we must define those more general principles. Because of the indeterminacy of the First Amendment’s text and original meaning, scholars often evaluate whether particular laws or judicial standards conform to the First Amendment by asking whether they further the goals underlying that Amendment. While some proposed underlying goals are more specific than others, the most general of the most widely accepted rationales include democracy and individual autonomy.

But neither democracy nor autonomy is a self-defining term, and the definition will often determine whether a particular principle supports “democracy” or “autonomy.” Indeed, perhaps everyone defines democracy and autonomy slightly differently, and some conceptions have almost nothing in common. Rather than trying to solve issues that have plagued philosophers for several thousand years—an issue like “what is the best conception of democracy?”—I will acknowledge that some conceptions of democracy and autonomy would support the architecture principles here, while others would not.

As a general matter, more substantive rather than merely formal conceptions of democracy and autonomy support these design principles. Formal conceptions of democracy and autonomy generally identify the primary or exclusive threats to democracy or autonomy to be discriminatory government action, and require that individuals have only basic rights (voting, property

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382 See sources cited supra notes 71, 73.
384 Scholars often describe negative liberty regarding free speech as having this nondiscrimination component. See Massey, supra note 38, at 313–17; BeVier, supra note 74, at 102-03. I am not sure
rights) to conclude that they have sufficient autonomy and democratic opportunities for a democracy.\textsuperscript{385} Under formal conceptions, one would be inclined to reject the design principles, which include affirmative and substantive impulses.

But, while academic support is not uniform or uncontested, many speech scholars and political theorists have often defended the design principles identified here, generally defining or defending a more substantive notion of democracy and autonomy.\textsuperscript{386} Under more substantive conceptions, positive liberties beyond background property rights may be necessary to ensure autonomy and democratic participation. Further, “private” actions, based in private law, may also limit these more substantive conceptions of democracy or autonomy.\textsuperscript{387} Using these conceptions, the architectural design principles are likely normatively desirable for promoting most individuals’ substantive freedoms. If one turns to general theory, then the principles are most defensible for ensuring the practical, substantive liberties of Americans.

While substantive theories tend to support the principles, the principles concretely lead to be speech-promoting outcomes. Again, we can use the Internet as an example. The principles permit government to provide universal access to Internet spaces, both through network neutrality and requiring carriers to build out their networks to serve all Americans. The model here would therefore ensure that all Americans have some basic, if legislated, ability to communicate with local and international friends, to receive information without permission that is as diverse as human thought, and to join and create civic and political organizations online.

While there are counterarguments to network neutrality based on a host of economic and even speech-based reasons, because network neutrality does not favor particular messages, the proper place for addressing those issues is the legislature.

This model, however, suggests an important (if circumscribed) role for the legislature, and this role is normatively defensible. Constitutional scholars have debated the role of judicial supremacy and have questioned whether legislatures


\textsuperscript{386} See sources supra note 45, 75. Scholars also debate whether laws passed to promote these principles actually do so. See sources supra note 279.

\textsuperscript{387} See Benkler, Autonomy, supra note 73, at 41-72.
should have role in creating constitutional law, even as “norm entrepreneurs,” or supplying the remedies that the judiciary cannot in order to validate judicially selected constitutional “rights.” As a practical matter, it “may be that not a great deal turns on the difference” among these conceptions, as both permit the legislature power to enforce constitutional norms. While the literature debating these issues is significant and insightful, it does not always focus on the free-speech guarantee, which many consider a quintessential judicial right.

But the tradition demonstrates that much American speech protection derives from legislation, and that alone might indicate the desirability of legislative actions in speech. Our “venerable” tradition has led to much legislation that furthers the ability of average Americans to be informed about our democracy and contribute to its discourse. The tradition suggests that government and the judiciary can work together, through judicial content-neutrality tests and discretion for actions furthering particular 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 others (including viewpoint-discrimination). It results in the constitutionality of laws such as government ownership limits, access rules, build-out rules, designating forums, and so on.

The judiciary can benefit from legislative competence and expertise. Legislatures, and agencies, have fact-gathering capabilities to determine which spaces may encourage speech. So long as legislatures and agencies are not suppressing particular messages, they should be more responsive than the judiciary to popular decision-making to determine which speech spaces should be available in society. This process is not perfect by any means, but individuals have the ability to contribute to discourse both through spaces required by legislation and those required directly by the judiciary.


390 See Schauer, Holfeld’s, supra note 75, at 928 (discussing rights under-enforcement and underinclusion); Daryl J. Levinson, Rights Essentialism and Remedial Equilibration, 99 COLUM. L. REV. 857, 885-88 (1999) (suggesting a constitutional right does not exist separately from the available remedy to vindicate that right).

391 Schauer, Holfeld’s, supra note 75, at 929-30 (discussing two of the conceptions).

392 See sources cited supra note 53.
Indeed, it is this legislative discretion that helps justify the standard model’s “exception” for traditional public forums. Under the standard model, judicial-affirmative spaces are an exception to negative liberty, though without an apparent justification. The analysis here suggests that judicial-affirmative spaces may be exceptions not only to negative liberty regarding individual speech but also to vast government discretion in opening and closing spaces. In light of that discretion, a judicially required space ensures that the public has at least minimal spaces to debate and contribute to the legislative decisions to open or close particular speech 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.393

While the architectural model has flaws, we live in an imperfect world where every model has flaws. We must compare the flaws of the architectural model with that of the standard model, or at least the standard model without “exceptions.” The standard model has far more flaws.

Indeed, the standard model would lead to outcomes that render our nation more a dystopia than a democracy. The standard model would likely permit no architecting beyond designated public forums and cross-subsidies for postal delivery; traditional public forums may or may not receive grudging acceptance. Government would be unable to impose common carrier rules, network neutrality rules, device-choice rules, text messaging rules, universal access rules, or must-carry rules for particular speakers. Individuals would lack the space for vigorous dissent, needing permission for access.

At the same time, a few powerful companies might have little incentive to protect dissenting or challenging speech. 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 directly silence.394 If just a few speakers, mainly commercial companies, control our nation’s speech spaces, such indirect government suppression becomes more effective.395

Further, consolidating speech outlets in the hands of a few people likely would grant these people the ability to dictate policy, or greatly influence it, to their preferred ends. Prominent examples include Silvio Berlusconi in Italy, who

393 See ELY, supra note 53, at 101-31.
used his media empire to become Italy’s longest serving, extremely corrupt prime minister, and the Associated Press-Western Union in our history, which influenced elections and legislation. Little suggests that a system with such dominant speakers, ineffectively checked by other sources, would lead to better decisions, more participatory decision-making, or increased individual autonomy relative to a more diffuse media system.

Some may argue that, despite not opening these spaces by law, the standard model would in fact lead to plentiful spaces through private action. An unfettered market could result in as much or more spaces than the architectural model. But that argument rests on assumptions about the competition possible in media and telecommunications markets that are likely false. These industries are concentrated, subject to what economists call overwhelming economies of scale and network effects; their owners have incentives to discriminate against some content rather than to carry all content; and they are usual, and often weak, targets for government pressure influencing their speech.

Finally, perhaps the standard model has one last virtue: scholars argue that it serves to protect newspapers, with the canonical citation here being *Miami Herald*. But even this virtue is overstated practically. Newspapers are migrating to digital platforms like the Internet. If the First Amendment requires newspapers to cut deals for either exclusive or preferred access to the Internet to reach audiences, then newspapers would be better off with an open, nondiscriminatory Internet. For this reason perhaps, newspapers (including the *New York Times*) that do not own cable systems generally editorialized aggressively in favor of network neutrality.

As a result, the outcomes of this analysis would support plentiful physical and virtual spaces for most speakers, rather than having little to no access to many spaces central to our discourse.

C. Rejecting the Usual Objections

Despite arguments from first principles and predicted outcomes, critics would object to the implications of this analysis based on intermediate “core” principles reflected by censorship paradigm cases.

397 See WU, supra note 243, at 22-25.
398 See BAKER, MARKETS, supra note 45, at 7-62.
399 See NUECHTERLEIN & WEISER, supra note 245, at 1-30.
400 See BARBARA VAN SCHEWICK, ARCHITECTURE AND INNOVATION 298-354 (2010).
401 See Benkler, supra note 394.
First, we can reject the usual, and most pervasive, counterarguments. These are based on the standard model’s intermediate principles. The architectural principles conflict with the “venerable traditions” of the First Amendment and with its central purposes, which include negative liberty, government distrust, value-neutrality, and anti-redistribution. As I have demonstrated, using these core principles as normative guidelines rests on two fallacies—inferring general principles from a small select sample, and then arguing these principles “ought” because they “are.” As I hopefully demonstrated, in somewhat painstaking detail, our venerable tradition also includes the intermediate principles I have termed architectural principles.

Second, critics could argue that permitting government to regulate private property to ensure greater access for speakers would eventually lead to government censorship. Essentially, our history shows that government will try to censor speech. Like the proverbial camel whose nose has entered the tent, it will use access rules to censor speech. This objection suggests that not only will legislatures try to stifle speech, but also that courts will fail to stop them. It is an argument predicting particular facts, based on assumptions of previous facts.

But the facts are less clear than this objection suggests. In our venerable tradition, common carrier rules have not resulted in a history of censorship. Sure, government has tried to censor indecent phone calls. But the Court has stopped these attempts, even on spaces subject to access rules. Our tradition suggests, in fact, that the Court has managed to limit the risk of censorship when government opens spaces for speech—or at least its record here is no better or worse than anywhere else regarding censorship. The judiciary has largely, 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. It has done so through doctrines far short of requiring government to “stay out” altogether. The Court needs merely to ensure that government does not engage in viewpoint-discrimination when adopting access rules. While the task of deciphering viewpoint-discrimination is difficult, it is the same task that courts accept for all First Amendment cases. Courts do not usually need a prophylactic rule to obviate the inquiry. To be more precise, these judicial checks, may have failed at times, such as in Red Lion or in O’Brien, a case that upheld a conviction for burning a draft card. But these judicial checks have succeeded regarding access rules at least as well as they have in other areas, none of which has a flawless record. Just as the Court still uses the principles derived in O’Brien but hopefully

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404 See sources cited supra note 2.
applies them with more sensitivity, the Court can still use the principles in *Red Lion* and other decisions.

Further, this pathological concern with government censorship may actually counsel in favor of design principles. In Lessig’s words, “What checks on arbitrary regulatory power can we build into the design of the space?” Design can complement doctrine, which has been marked by the Court’s repeated upholding censorship during wartime. Government can create the equivalent of “constitutional” restraints through architecture. With a concentrated speech system controlled by a few speakers, and with minimal open spaces, government can more easily manipulate a few outlets and suppress critical news, including during wartime. Moreover, a society with plentiful speech spaces for all speakers would support a democratic *culture* of speech, increasing the difficulty of imposing censorship in perilous times. In light of this censorship risk, the nation can choose to open speech spaces for diffuse speech power rather than closing speech spaces and placing them within the control of a few powerful commercial targets of government pressure.

Finally, critics would object that the public/private distinction trumps these design decisions, for both judicially required and permissible spaces. Whether or not these principles are desirable, they require legal application to private parties that conflict with constitutional norms.

First, they would argue, judicially required spaces violate the public/private distinction. This distinction means *Marsh*, which required access to streets in a company town, is wrong. The Constitution generally applies to public, not private action, and the First Amendment should not be an exception. But legal realists have long objected that the “distinction between direct state abridgement of rights and private abridgement collapses in particular contexts.” For example, *Marsh* does in fact also involve public, as well as private, property. Enforcement of a town’s “private” property rights requires public property, including judicial resources. At times, though rarely, the Court has decided to consider this public involvement when it applied constitutional restrictions to government enforcement of “private” rights.

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406 See sources cited supra note 2.
409 See Balkin, supra note 8, at 381.
410 See BeVier & Harrison, supra note 84, at 1823-24 (2010).
Counterarguments to this legal realist point often prove too much. Professor BeVier has argued that recognizing public property in *Marsh* is flawed because it would lead to absurd results. If the private company owning the town is a “public actor” because of government power, the excluded speaker is also a “public actor” when it seeks government power to guarantee his access. If both are public actors and if both want to use the same property for expression, then each could bring a First Amendment claim against the other. Like one of Zeno’s paradoxes, each could argue that the other has to meet strict scrutiny.\(^{412}\)

But the paradox is more apparent than real, and has not paralyzed judges. The paradox results from assuming both a particular judicial standard that both actors would receive, and a value-neutrality towards speakers. The judiciary can choose other standards, and can make distinctions among speakers and speech uses—treating the company town’s property simply as a space rather than an extension of a property-holder’s rights. Though the town may assert a right to use all of its property for a particular “speech purpose”—requiring the silencing other speakers—the Court need not conclude that any burden on property is a meaningful burden on the town’s speech.

Moreover, the Court need not apply the two standard scrutiny tests. Different tests apply in different contexts for First Amendment problems. Indeed, in other contexts, courts have applied other tests affirmatively to limit some individual’s private property for the benefit of others’ speech interests. For example, copyright confers a private property right on almost fixed, original expression,\(^{413}\) but the Supreme Court has suggested that the First Amendment requires a limitation on this private property right for “fair use” for criticism, parody, and education.\(^{414}\) This is effectively a “First Amendment” easement to use private property, from *Gone with the Wind* to *Pretty Woman*.*\(^{415}\) In form, it is no different from requiring the speech easement in *Marsh*. Yet the courts need not entertain reciprocal First Amendment arguments against one another merely because of a First Amendment limit on private property.\(^{416}\) Rather, the Court can decide that some property rights (the company town’s, the copyright holder’s) should give way to other rights, and crafts tests accordingly.

\(^{412}\) See Bevier, *supra* note 84, at 1822–24.
At the same time, reputational rights are also conceived as private property rights, but courts have placed First Amendment limits directly on those private rights. For example, the Supreme Court imposed a First Amendment “easement” on what is effectively a private property right in reputation, through New York Times v. Sullivan’s “actual malice” standard.\(^{417}\) Further, New York Times, like Marsh, imposes the property burden only on some property-holders, not on all: one for public figures, one for owners of company towns. In these cases at least, particular exercises of government power to back “private” decisions conflict with the First Amendment. We can debate which other cases reach this threshold. For Marsh, the Court could simply ask whether the town-owner has channels of communication without the right to silence everyone in the town, and whether the First Amendment’s interest in ensuring individuals can speak in company towns outweighs the owner’s property- or asserted speech-interests.

Second, scholars also argue that permitting government to further First Amendment goals violates the public/private distinction, especially when government burdens private property with access rules or universality. But the public/private argument against legislative action here is different from the Marsh argument. Unlike constitutional law, legislative decisions generally do apply to private actors; consider tax law and speed limits. Rather, scholars imply that the First Amendment imposes a particular public/private distinction, forbidding legislative action affecting private speech. As a descriptive matter, this argument conflicts with everything from copyright law (which silences copyists) to must-carry laws and common carrier laws.\(^{418}\)

More importantly, this public/private distinction cannot meaningfully provide any guidance for the First Amendment because government is always “affecting” private speech. One must rely on some rationale to determine which effects are problematic. An analogy here would be Miller v. Schoene,\(^ {419}\) an 80-year old case where the Court upheld a state’s power to protect apple tree orchards from “cedar rust” by chopping down cedar trees. The Court held that both government “action” (passing the law burdening cedar owner’s private property) and inaction (not passing the law) would affect private property rights and consisted of a governmental choice.\(^ {420}\) Essentially, government action or inaction would both result in considerable effects on private property. Government could not help but be involved. The same is true for speech property. Every property


\(^{418}\) The Constitution specifically authorize Congress both to adopt copyrights and to regulate interstate commerce, so no explicit constitutional authority can require an exception to the state action doctrine any more or less for copyright than for regulation of interstate commerce.

\(^{419}\) 276 U.S. 272 (1928).

\(^{420}\) See id. at 279.
burden could be conceived of a speech burden, as Michael Seidman has explored.\textsuperscript{421} No less than the Due Process Clause in \textit{Lochner}, the First Amendment would cripple government’s ability to regulate property, including property central to our nation’s commerce—Internet lines.\textsuperscript{422}

We can look at specific examples to make this insight concrete. Government must be involved for millions of Americans to receive television, phone, and Internet services from their cable providers. For example, cable companies string their lines on poles and bury them underground—on others’ private property—thanks to government burdens on the \textit{those} property rights.

First, cable operators string lines on utility poles owned by private power companies. They do so thanks to government access requirements imposed on those power companies.\textsuperscript{423} If government could not burden property used for speech—and one key use of these poles is speech—then the power companies could raise a strong First Amendment argument claim that such access is unconstitutional. They could raise arguments no different than those accepted by the dissent in \textit{Turner}: these “cables must-carry” laws compel their speech, forcing them to “speak” several dozen channels of porn and violence, abridging their editorial discretion over speech on their private property. Indeed, under the standard model, they should be able at least to invoke the \textit{Turner} standard, and require government’s burden on their property/speech rights to be no greater than necessary to advance important goals. The effect would be judicial second-guessing of whether government has substantial evidence to prove that it had burdened power companies no more than necessary to further important goals. The courts could seek evidence on whether access at a higher fee to power companies, or with fewer cables, would further these goals just as well, resulting in the invalidation of pole-access rules.


Second, at the same time, cable companies would also be unable to bury their lines without government burdening private property rights. While governments confer “public” rights of way to cable companies, some of these “public” rights are located on private property. These rights may traverse my home to reach a neighbor’s. If the government has conferred a right of way—on my property—to a cable company, I could assert that government is burdening my right to use my use of my property for my own chosen speech purposes. By transferring my property rights to a cable company, the government has “compelled” me to speak, abridging my editorial discretion, forcing me to carry speech with which I disagree on my own property. These are the exact arguments made in Turner and by opponents of network neutrality. Government empowers broadcasters in Turner, and empowers all individuals and businesses in network neutrality, to use another’s property. In neither case is the government conferring a property right in government-owned property. A world where government lacks this power would be one with far less speech and far less diverse speech available to Americans—and far less speech for cable companies.

Finally, these facts extend to every major speech space. Like cable companies, phone companies need access to utility poles and land privately owned by others. Wireless licensees do not formally have property rights in their frequency, or at the very least share those property rights with the public. Government has conferred limited property rights to those wireless companies, which they take from the private individuals who own the spectrum—which is the rest of us—“compelling” us to speak. If government cannot designate private property to public purposes—including the purposes underlying the First Amendment, from diversity to increasing speech to increasing universal access and fostering an American speech identity—then our speech environment would be almost as poor as the one Ed faces in his imaginary nation.

D. Theoretical Implications: Core Principles of the First Amendment

The theoretical implications can be stated briefly, but require more complete exploration in future work.

First, theorists should integrate speech architecture into their doctrinal and theoretical accounts of the First Amendment. Integrating these principles will yield a more nuanced understanding of First Amendment doctrine and theory. This doctrine would be attentive to practical reality and real world capabilities, rather than merely a stylized image of a paradigmatic dissenter. Theorists should

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integrate the principles partly because they are not mere dicta or philosophical musings, but reflect the outcomes of cases and decades of constitutional practice of government—designating additional spaces, ensuring diverse sources, binding the nation, and encouraging universal discretionary spaces beyond judicially required spaces.

Second, free speech theorists should rethink the scope and meaning of inferred intermediate principles, such as negative liberty, government distrust, value-neutrality, and anti-redistribution. While these principles are certainly reflected in doctrine, they do not invariably trump other principles that, according to Turner, also “promote values central to the First Amendment.” Rather, in some contexts and domains, certain principles may be dominant. In other contexts, courts pursue several principles together; for example, enabling diverse sources while mitigating the risk of message-focused censorship.

Third, theorists should explore the differences between doctrine animated by sufficiency and diversity concerns (both of which influence our tradition), as distinct from equality concerns (which seem less pronounced in precedent, though more often discussed in scholarship). Political philosophers debate these concerns, but some suggest that sufficiency is a more workable, and desirable, goal than equality.426

An equality norm includes some problems that a sufficiency norm lacks.427 To ensure “equality,” a direct route could be suppression. If everyone is silent, everyone is equal. But silencing speech to ensure equality would conflict with other apparent norms of freedom of speech—namely that government not restrict speech merely to increase the relative speech power of some.428 On the other hand, if government chooses to pursue “equality” of speech by using subsidies not restrictions, government would still face difficult challenges. Aiming for 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

426 See generally Harry Frankfurt, Equality as a Moral Ideal, 98 ETHICS 21-22, 33-35 (1987). See also SWIFT, supra note 383, 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); see also Fee, supra note 75, at 1106 (arguing that “[t]he central guarantee of the freedom of speech is to secure for all citizens plentiful places and means to communicate their ideas to the public”). On the difficulty of specifying a minimum, see JOHN RAWLS, A THEORY OF JUSTICE 277 (1971).


428 Indeed, Buckley’s “canonical” sentence-phrase might mean little more than that, rather than standing for a broader anti-redistribution principle in many areas.
have to confer varying amounts for speech subsidies, easily inviting the risk of
government using subsidies to “punish” and “reward” messages. The judiciary
would likely lack the competence, considering information asymmetries, to
determine whether the government is using subsidies merely to promote equality
or to punish viewpoints.

Sufficiency principles are less likely to support restriction, as the goal is to
ensure individuals have at least a sufficient right or capability, rather than that
they all have some equal amount. Further, if government used subsidies not
restrictions, the subsidy for sufficiency would likely be widely available and
equivalent for all: for example, access to streets and parks and public access
channels, phone systems, and the open Internet. This availability yields less
opportunity for abuse, and more potential for judicial oversight. Of course,
determining a sufficient minimum is not easy. But, as suggested, in determining
minimally sufficient spaces, the judiciary can piggy-back on legislative expertise
and public will by requiring government to designate spaces even-handedly. If the
legislature determines that Republicans need access to the Internet to speak
sufficiently, then the judiciary can determine that Democrats do as well.

Fourth, theorists should explore the principle of promoting diverse and
antagonistic sources as distinct and different from a principle promoting
“equality.” The canonical sentence in Buckley (the whole sentence) distinguishes
between the two, suggesting restricting speech for equality is impermissible partly
because the First Amendment aims to further diverse sources. I am not sure
whether this Article can contribute much to the difficult and long-puzzling task of
exploring the difference between diverse sources, redistribution, and equality. But
it does suggest that scholars cannot merely dismiss the diverse-sources principle
as mere dicta or fantasy, in conflict with “core” speech principles, nor classify it
simply as an “equality” concern. Rather, both the need for diverse sources and the
concern for negative liberty have a place in speech doctrine. Scholars can debate
their justifiability, but cannot merely write one off as conflicting with venerable,
preferrd, traditions.

Finally, scholars should consider the important role of legislative norms in
furthering First Amendment values and principles. At the same time, scholars
should explore the role of the judiciary in checking the most significant dangers of
this legislative action. The analysis here poses provide initial insights on how
legislatures can entrench and further constitutional norms regarding freedom of
speech.

Conclusion

429 See, e.g., Casal, supra note 426, at 313 n.46.
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.