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KEYNOTE SPEECH: THE FIRST AMENDMENT AND MASS COMMUNICATION

MARVIN AMMORI*

Verizon argued in January 2014 that a network neutrality rule would violate the First Amendment. This article will show precisely the opposite: that such a rule would be constitutional and would not violate the First Amendment. The *Verizon v. FCC*¹ decision in January 2014 did not address this question.²

Verizon argued that stopping it from censoring speech, blocking websites, and discriminating in favor of or against specific websites violates its First Amendment right to “edit the Internet,” much as a newspaper edits articles.³ In short, if Verizon can’t censor the Internet, the government has violated its free speech rights. Though this argument has inspired scholarly debate, the argument makes most people laugh: how could anyone actually buy Verizon’s insanely, unbelievably stupid argument? Oddly, Verizon’s argument largely makes sense within the structure of how most scholars think about First Amendment law. Rebutting it requires you to peel back lots of layers and actually think about the First Amendment differently.

When I was attending Harvard Law School, I used to go to a Yale-Harvard workshop where we would present papers. One of my friends pointed out that, while the Harvard students would very carefully

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1. 740 F.3d 623 (D.C. Cir. 2014).

2. *Id.* at 634.

3. Joint Brief for Verizon and MetroPCS at 43, *Verizon*, 740 F.3d 623 (No. 11-1355), 2012 WL 9937411, at *43. (“In performing these functions, broadband providers possess ‘editorial discretion.’ Just as a newspaper is entitled to decide which content to publish and where, broadband providers may feature some content over others.”).

work through the precedent and make detailed arguments about doctrine and how we should think about the law, the Yale kids would just sort of put a few Post-It notes in front of them, run their hands through their hair in scholarly anguish, and exclaim, "This whole area of the law is wrong!" I'm going to do both. I'm going to say that you've been thinking about the First Amendment in mass communications all wrong *and* walk you through the reasons why.

Scholars think about the First Amendment the wrong way largely because they ignore mass media telecommunications precedents. Their thinking has been shaped by a core group of cases that revolve around pamphlets and street corners and soapboxes and hate speech and flag burning.⁴ That's not how you and I get most of our information today, nor are they the most direct precedents for Internet access. These scholars do not think about speech based on where we contribute to and receive most of our speech every day: broadcast and cable television, phone networks, the Internet, and so on. But you should think about the First Amendment by incorporating the precedents and case law around all of the major communications media that we've been using for the last 300 years, beginning with newspapers and the postal network (the main communications network for more than the first century of the republic⁵) and continuing through to the telegraph, the phone network, broadcast, and radio. If you look at these cases *in addition to* the pamphlet cases

4. For pamphlets, see generally *Schenck v. United States*, 249 U.S. 47 (1919) (affirming the convictions of socialists who had distributed leaflets critical of the draft and U.S. involvement in World War I because they presented a clear and present danger to the government); *Abrams v. United States*, 250 U.S. 616 (1919) (affirming the convictions of Russian anarchists for criticizing U.S. foreign policy and calling for revolution). For street corners/sidewalks, see *Boos v. Barry*, 485 U.S. 312 (1988) (holding that a District of Columbia ordinance violated the First Amendment by prohibiting the display of signs critical of foreign embassies and their governments). For hate speech, see generally *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (holding that an ordinance that prohibited the burning of a cross or swastika with the intent to incite anger, alarm or resentment on the basis of race, color, creed or religion violated the First Amendment). For flag burning, see generally *Texas v. Johnson*, 491 U.S. 397 (1989) (holding that the defendant had a First Amendment right to burn the American flag as a form of political protest).

5. "The United States may give up the post-office when it sees fit, but while it carries it on, the use of the mails is almost as much a part of free speech as the right to use our tongues . . ." *Lamont v. Postmaster General of U.S.*, 381 U.S. 301, 305 (1965) (citing *Pike v. Walker*, 121 F.2d 37, 39 (1941)).

you get a very different view of what the First Amendment means. The flag-burning⁶ and pamphlet⁷ cases frame the First Amendment as a *negative* liberty to keep government out. If you look at all these other media, you think of the First Amendment as something that permits the government—the legislature—to encourage a kind of democratic “architecture” of speech, with lots of spaces, both virtual and physical, for people to communicate with one another and with diverse and antagonistic sources, and extend these different speech spaces and platforms to as many Americans as possible. It is not necessarily an “affirmative” vision for the judiciary, but it allows Congress and the Federal Communications Committee (FCC) to further affirm these basic First Amendment goals.

This article will discuss how scholars sometimes misunderstand the First Amendment and how to properly understand it, and then apply those insights to the net-neutrality context. In doing so, the article will show why Verizon’s argument is so wrong.

I. NET NEUTRALITY

Let’s begin with net neutrality itself. Perhaps you’ve seen the most important informational piece about net neutrality: a segment from the news/comedy show *Last Week Tonight with John Oliver*.⁸ After it aired, the video went viral: over seven million people have seen it.⁹

Net neutrality is the concept that the phone and cable companies that provide you with access to the Internet should not block certain websites or applications—arbitrarily or for business reasons.¹⁰ They shouldn’t block Vonage or Skype or Netflix or the *New York Times* website. They also shouldn’t discriminate by treating some websites better than others.¹¹ Even if Google comes along and pays Comcast a lot

6. See *Texas v. Johnson*, 491 U.S. 397 (1989).

7. See *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939).

8. See *Last Week Tonight with John Oliver: Net Neutrality* (HBO television broadcast June 1, 2014).

9. John Oliver, *Last Week Tonight with John Oliver: Net Neutrality*, YOUTUBE, (June 1, 2014), <https://www.youtube.com/watch?v=fpbOEOrRHyU>.

10. *What is Net Neutrality?*, ACLU, <https://www.aclu.org/net-neutrality> (last visited April 12, 2015).

11. *Id.*

of money, its search engine shouldn't load any faster than Bing or DuckDuckGo. Google's YouTube service shouldn't load faster than Vimeo or any of the other video platforms out there. Verizon shouldn't be allowed to make an exclusive deal in which the only way to pay someone on the Verizon network is through PayPal and no other method. That's the idea. In 2010, the FCC codified net neutrality by adopting a rule that would burden the phone and cable companies (in those companies' view) by forbidding them from blocking and discriminating.¹²

Earlier this year, the D.C. Circuit Court threw out that FCC rule based on a lack of authority.¹³ Essentially, from 2002 to 2005, the FCC had categorized home access to the Internet as an unregulated service—like Twitter—rather than a regulated service—like phone calling, mobile phone calling, Internet access offered to big businesses, and Internet access offered by many rural phone companies. Because of those earlier decisions, the FCC had to “reclassify” the service as a regulated one in order to impose net neutrality. Since that decision striking down the 2010 rule, Verizon, AT&T, and Comcast are now permitted, in theory, to block websites, to discriminate, and to charge some websites for faster service. The debate following that case is whether or not the FCC will adopt a rule stopping them from doing it.¹⁴ Because the Court did not strike down the rule based on authority, it did not get to Verizon's First Amendment argument—an argument that Verizon will make against any future rule.

Verizon argued then, and continues to argue, that if you curtail its “editorial freedom” to edit the Internet however it seeks to—because Verizon is the one carrying the final package to your doorstep—its First Amendment rights be will violated.¹⁵ Verizon is arguing for something called *Turner* scrutiny,¹⁶ derived from the 1997 Supreme Court case *Turner Broadcasting System, Inc. v. FCC*.¹⁷ *Turner* provides that to

12. See *Preserving the Open Internet, Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd. 17905 (2010).

13. See *Verizon v. FCC*, 740 F.3d 623, 632 (D.C. Cir. 2014).

14. *Id.*

15. See Joint Brief for Verizon and MetroPCS, *supra* note 3.

16. See *id.*

17. 520 U.S. 180, 180 (1997).

regulate a communication network—that is to impose “content-neutral” regulation on speech—the government needs to show that doing so would serve an important interest and that the rules would be narrowly tailored to that important interest.¹⁸ The important interest can always be something to improve the architecture of speech, such as promoting diverse and antagonistic sources or ensuring access to the widest of dissemination of speech to all Americans. Verizon then wants the FCC to have to justify any burden on its censorial/editorial rights and to have courts second guess—through Turner’s *heightened* scrutiny—any rules that limit how they provide (discriminatory) Internet access.¹⁹

On the other side of the debate remains a whole range of actors who refer to net neutrality as the “First Amendment of the Internet.” This side is very pro-free expression. The Internet has been a democratizing medium. We have seen people use YouTube to bring down totalitarian regimes abroad.²⁰ We’ve seen Barack Obama organize on the Internet very effectively.²¹ Campaigns have moved to the Internet.²² Most of us learn about major news events—that Osama bin Laden had been killed, for example—on Twitter, not from newspapers. Social media platforms really have become central channels for free expression.

18. *Turner*, 520 U.S. at 635.

19. See Joint Brief for Verizon and MetroPCS, *supra* note 3, at 44–46.

20. Sadaf Ali & Shahira Fahmy, *The Icon of the Egyptian Revolution: Using Social Media to Topple a Mideast Regime*, in *SOCIAL MEDIA GO TO WAR: RAGE, REBELLION, AND REVOLUTION IN THE AGE OF TWITTER* 383–85 (Ralph D. Berenger ed., 2013); Catherine O’Donnell, *New Study Quantifies use of Social Media in Arab Spring*, UNIV. OF WASH. (Sep. 12, 2011), <http://www.washington.edu/news/2011/09/12/new-study-quantifies-use-of-social-media-in-arab-spring/>.

21. Matthew Fraser & Soumitra Dutta, *Barack Obama and the Facebook Election*, U.S. NEWS & WORLD REP. (Nov. 19, 2008, 12:20 PM), <http://www.usnews.com/opinion/articles/2008/11/19/barack-obama-and-the-facebook-election>; T.W. Farnam, *Obama has Aggressive Internet Strategy to Woo Supporters*, WASH. POST (Apr. 6, 2012), http://www.washingtonpost.com/politics/obama-has-aggressive-internet-strategy-to-woo-supporters/2012/04/06/glQAavB2zS_story.html.

22. Darren Samuelsohn, *The Next Big Thing in Campaigns*, POLITICO (Aug. 26, 2014, 5:05 AM), <http://www.politico.com/story/2014/08/2014-elections-digital-advertising-110322.html>.

In May of 2014, 150 companies signed a letter in favor of net neutrality.²³ This is the letter that John Oliver, in the above-mentioned segment, likened to Superman and Lex Luthor working together to kick out a neighbor they didn't like.²⁴ This letter included every kind of web company: from Microsoft and Google²⁵ to Gawker, Vox, Reddit, Netflix, Twitter, and Tumblr.²⁶ These companies run the basic speech platforms that people use to find out news and share information—and all of them were on the same side: in favor of net neutrality.²⁷ Likewise, the *New York Times*, which is generally pro-First Amendment,²⁸ often editorializes in favor of net neutrality.²⁹ Like them, I argue that net neutrality furthers the First Amendment rather than constraining it because it opens up a space for speech that allows all of us to communicate with one another, in a way that includes everyone and has been profoundly good for democracy. To put a fine point on it, it's within Congress's discretion to adopt that law or not. We often think of the First Amendment as telling Congress what to do, but it also permits Congress to adopt a law like this: one that is even-handed and content-neutral and that opens up a space for speakers.

23. Brian Fung, *Google, Netflix Lead Nearly 150 Tech Companies in Protest of FCC Net Neutrality Plan*, WASH. POST (May 7, 2014), <http://www.washingtonpost.com/blogs/the-switch/wp/2014/05/07/google-netflix-lead-nearly-150-tech-companies-in-protest-of-fcc-net-neutrality-plan/>.

24. *See supra* note 9.

25. *Net Neutrality Company Sign-on Letter*, SCRIBD (May 7, 2014), <http://www.scribd.com/doc/222755261/Net-Neutrality-Company-Sign-on-Letter>.

26. *Id.*

27. *Id.*

28. *See, e.g.*, David Brooks, *I Am Not Charlie Hebdo*, N.Y. TIMES, Jan. 8, 2015, <http://www.nytimes.com/2015/01/09/opinion/david-brooks-i-am-not-charlie-hebdo.html> (calling for greater acceptance in the United States for controversial free speech); Editorial, *What is a True Threat on Facebook?*, N.Y. TIMES, Dec. 1, 2014, <http://www.nytimes.com/2014/12/02/opinion/what-is-a-true-threat-on-facebook.html> (maintaining that, regarding online threats, though terrifying, the government must prove intent to threaten); Editorial, *The Met Opera Stands Firm*, N.Y. TIMES, Sept. 19, 2014, <http://www.nytimes.com/2014/09/20/opinion/the-death-of-klingshoffer-must-go-on.html> (praising the Metropolitan Opera for presenting opera despite protests).

29. Editorial, *A Disappointing Internet Decision*, N.Y. TIMES, Jan. 15, 2014, <http://www.nytimes.com/2014/01/16/opinion/a-disappointing-internet-decision.html>.

II. SCHOLARS' COMMON MISUNDERSTANDING OF THE FIRST AMENDMENT

This is the part where I explain that everything you know about the First Amendment is wrong. That's a slight exaggeration, but, as I mentioned, the way we tend to think about the First Amendment is that it's a negative liberty.³⁰ Government should just stay out of speech.³¹ It shouldn't make any value determinations about what kind of speech is beneficial or not beneficial.³² This view is grounded in a deep distrust of government. If the paradigm cases are the flag burner, the soapbox dissenter, or someone else engaging in unpopular speech in a public space,³³ then the judge becomes hero of the narrative and Congress or the mayor is someone you simply can't trust to open up new spaces for speech or to shape the architecture of communication.

First Amendment casebooks and treatises often include a few hundred pages on cases involving pamphlets and utility poles and buses³⁴ and then, at the end, a section called "special exceptions" or "special cases" that deal with the broadcast media,³⁵ which for decades was the most popular way for people to learn about news and public affairs.³⁶

30. Pahls v. Thomas, 718 F.3d 1210, 1239 (10th Cir. 2013); Zachary C. Larsen, *The Egalitarian First Amendment: Its History and A Critique on the Grounds of Text, Rights, Negative Liberty, and Other Republican Constitutional Structure*, 31 N.C. CENT. L. REV. 153, 169 (2009).

31. Larsen, *supra* note 30, at 169.

32. *Id.*

33. See *Texas v. Johnson*, 491 U.S. 397 (1989) (recognizing flag burning as expression); *Schneider v. State*, 308 U.S. 147 (1939) (upholding right to distribute leaflets on public property).

34. See GEOFFREY R. STONE, ET. AL., *THE FIRST AMENDMENT*, 346, 361–62, 374 (4th ed. 2012) (citing *Schneider v. State*, 308 U.S. 147 (1939) (leafleting); *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (utility poles); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (public transportation)).

35. *Id.* at 280–82 (referencing broadcast media and cable cases).

36. Judith C. Aarons, *Cross-Ownership's Last Stand? The Federal Communication Commission's Proposal Concerning the Repeal of the Newspaper/Broadcast Cross-Ownership Rule*, 13 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 317, 321–30 (2002) (detailing the history of broadcast media regulations).

There might be another “special exception” section for cable³⁷ or for phone networks.³⁸ In my view, this is like saying, “Look at the moon. The moon goes around the earth. We can extrapolate from that that everything revolves around the earth,” and having people say, whenever you point to another planet that’s moving in a different direction, “No, no, no, that can’t be right. Everything revolves around the earth.” When Verizon argues, “We are an editor, the Internet is speech, and government should not interfere with speech,” it’s plausible within the framework of traditional, negative-liberty First Amendment law.³⁹ This is what you see in legal briefs and articles:⁴⁰ it would offend the First Amendment’s core rule against government making value judgments to impose a rule that the Internet should be free and open.

Astronomers know that dark matter makes up ninety-six percent of the universe, and we can’t even see it.⁴¹ In terms of our communications, the so-called “exceptions” make up just about as much of our speech. Except we can see these. Reading all the cases out there, we find a whole set of supposedly different exceptions for mass media, but they all seem to be moving in the same direction, and I argue they are not at all one-off exceptions. We can extrapolate some principles from them that will help guide us in the Internet age, as we move closer to

37. See STEVEN H. SHIFFRIN & JESSE H. CHOPER, *THE FIRST AMENDMENT: CASES, COMMENTS, QUESTIONS* 442, 459 (5th ed. 2011); STONE, *supra* note 34, at 387.

38. See SHIFFRIN & CHOPER, *supra* note 37 at 442, 459; STONE, *supra* note 34, at 387.

39. See Simon Maloy, *Verizon Wants The “Freedom” to Edit Your Internet*, MEDIA MATTERS FOR AMERICA (July 9, 2012, 1:53 PM), <http://mediamatters.org/blog/2012/07/09/verizon-wants-the-freedom-to-edit-your-internet/187003> (“Verizon, per the court document, considers itself your Internet [editor]. . . . Verizon, however, argues that it has the constitutionally protected right to decide which content you, as a Verizon customer, can access—that it is no different from a newspaper editor.”).

40. See, e.g., Joint Brief for Verizon and MetroPCS, *supra* note 3; Alexander Owens, *Protecting Free Speech in the Digital Age: Does the FCC’s Net Neutrality Order Violate the First Amendment?*, 23 TEMP. POL. & CIV. RTS. L. REV. 209 (2013).

41. Linda Rowan & Robert Coontz, *Welcome to the Dark Side: Delighted to See You*, SCIENCE, June 20, 2003, at 1893 (“Dark stars, the dark age, dark matter, and dark energy are the major components of the dark side of the universe: 96% of the universe consists of mass and energy we can’t see and don’t really understand.”).

having *all* of our communication, including the *New York Times*, on the Internet and find ourselves in need of access to an open, nondiscriminatory web.

Instead of simply drawing principles from a negative-liberty paradigm, then, how *should* we think about the First Amendment?

Congress and the FCC—and government in general—are permitted under the First Amendment to open up speech spaces for all of us to communicate, both on public property and on private property.⁴² People often make a big deal about government opening up private property versus public property. The rules tend to be pretty uniform across the two, and the government also tends to be permitted to open physical spaces, like designated public forums or shopping malls, as well as virtual spaces.⁴³ By “virtual spaces,” I mean anything that’s mediated: the postal service, which carries letters and newspapers; the phone, which allows us to connect across great distances; the Internet; broadcast; and so on. In both kinds of spaces, the government can impose burdens on the people who manage that space to let everyone speak, including diverse and antagonistic sources.⁴⁴ The government can open designated public forums and limited public forums.

Traditionally, courts require sidewalks to be open to public speech, but Congress or the city government can go one step further and designate other public properties, such as auditoriums, theaters, and malls, as open to public speech.⁴⁵ The only condition is that they do so in a way that is content-neutral and viewpoint-neutral, so that some viewpoints don’t benefit over others.⁴⁶ For instance, opening up an auditorium only for people who are anti-gun or pro-choice would be impermissible. There is also no requirement that opening up the space to speakers must be done in a way that’s narrowly tailored to the goal of promoting speech. It just has to be content-neutral and viewpoint-neutral.

42. See, e.g., Protecting and Promoting the Open Internet, Notice of Proposed Rulemaking, 29 FCC Rcd. 5561 (2014).

43. See *id.*

44. See Stacey D. Schesser, *A New Domain For Public Speech: Opening Public Spaces Online*, 94 CALIF. L. REV. 1791 (2006); John J. Brogan, *Speak & Space: How the Internet is Going to Kill the First Amendment as We Know It*, 8 VA. J.L. & TECH. 8 (2003).

45. See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

46. See *id.* at 45–46.

Government is encouraged to do that. Such spaces are referred to as designated public forums.

A limited public forum is where the government opens up a public space for a limited purpose, often educational or political, perhaps about certain kinds of speech. Think of a center to be used only for educational purposes. This also tends to be viewpoint-neutral, usually involved some kind of core democratic speech. The government can do that on government property.⁴⁷

Let's go to another publicly owned forum, a virtual network the government owns: the United States Postal Service, which for a very long time was how people got newspapers.⁴⁸ Congress spends a lot of time thinking about the postal network. Before the Constitution, postmasters were often publishers who would use their positions to create a newspaper, distribute it for free, and keep rival newspapers out.⁴⁹ Benjamin Franklin, for example, had trouble distributing his newspaper before he became postmaster because the previous postmaster ran a competitor newspaper and barred *The Pennsylvania Gazette* from mail distribution.⁵⁰ The first Congress got rid of that idea. It fired the first postmaster, made it so that all newspapers could be carried through the postal press,⁵¹ and established huge subsidies for community newspapers in order to promote local speech.⁵² Letters and commercial advertisements were expensive, but local newspapers were cheap; the *New York Times*, on the other hand, would have to pay a higher rate, so local newspapers could compete against larger national ones.⁵³ These

47. See *id.* at 47–48.

48. See generally *Postage Rates for Periodicals: A Narrative History*, U.S. POSTAL SERVICE (June 2010), <https://about.usps.com/who-we-are/postal-history/periodicals-postage-history.htm>.

49. See *id.*

50. *Benjamin Franklin*, U.S. POSTAL SERVICE (Feb. 2003), <https://about.usps.com/who-we-are/postal-history/pmg-franklin.pdf>.

51. See *Postage Rates for Periodicals: A Narrative History*, *supra* note 48.

52. See ROBERT W. MCCHESENEY & JOHN NICHOLS, *THE DEATH AND LIFE OF AMERICAN JOURNALISM: THE MEDIA REVOLUTION THAT WILL BEGIN THE WORLD AGAIN* 124–25 (2010).

53. See also Act of Mar. 3, 1845, ch. 48, 5 Stat. 733 (repealed 1852) (providing that newspapers be transmitted free of charge to subscribers within thirty miles of the city, town, or other place in which the paper is or may be printed).

subsidies were well thought out and debated within the postal network,⁵⁴ and such debates included ideas about content neutrality even as they hugely subsidized newspapers and created ways to encourage both national and local newspapers to thrive. Essentially, the same standards that applied to public forums applied to the postal service.

In addition to the postal service, there are other non-governmental spaces where the government has essentially done the equivalent of designated public forums, but in ways that are generally subject to some exception or another; this usually amounts to some hand-waving, but these cases all stumble in the same direction. Much as a common-law scholar might look at contracts cases and see that they all point toward efficiency, these all point toward the idea that government can open up spaces, even on private property.

Shopping malls are a good example. There is a whole set of First Amendment cases related to speech inside shopping malls that go one way, then another, then another.⁵⁵ First, the idea was that shopping malls are just like streets and sidewalks; so, by judicial fiat, they're open.⁵⁶ That changed a few years later, when the composition of the Court changed.⁵⁷ The unanimous leading case at the moment, however, is *Pruneyard Shopping Center v. Robins*,⁵⁸ which holds that a state constitution can open up shopping malls to speech.⁵⁹ Essentially, the case gives the government the right under certain conditions to go farther than the judiciary by opening up spaces, including private buildings like malls, if they are seen as public enough.⁶⁰ People wouldn't confuse the speech of protesters at a shopping mall with speech by the owner of the

54. MCCHESENEY & NICHOLS, *supra* note 52 at 123.

55. *See, e.g.*, *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980); *Hudgens v. NLRB*, 424 U.S. 507 (1976); *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972); *Amalgamated Food Emps. Local Union 590 v. Logan Valley Plaza*, 391 U.S. 308 (1968); *State v. Miller*, 159 N.W.2d 895 (Minn. 1968); *Marsh v. Alabama*, 326 U.S. 501 (1945).

56. *See, e.g.*, *Amalgamated Food*, 391 U.S. at 308; *Miller*, 159 N.W.2d at 895; *Marsh*, 326 U.S. at 501.

57. *See, e.g.*, *Hudgens*, 424 U.S. at 507; *Lloyd Corp.*, 407 U.S. at 551.

58. 447 U.S. 74 (1980).

59. *Id.* at 74, 88.

60. *See generally id.* at 91 (affirming the California Supreme Court that “[s]hopping centers to which the public is invited can provide an essential and invaluable forum for exercising those [First Amendment] rights.”)

shopping mall.⁶¹ When the space was so public that the speakers would not be identified with the owners, a state constitution can deem the private space open for speech. Such a declaration is fairly analogous to opening up a communications network that is privately owned.

In fact, phone lines are subject to something called *common carrier regulation*, which means they have to serve all without discrimination.⁶² For example, if I pick up the phone to call Laura, AT&T can't reroute me to Enrique. Verizon isn't allowed to send me a message saying, "We believe this is our speech because it's our network; therefore we're going to tell Laura something completely different than what you planned on telling her."

This kind of regulation began with the telegraph, which was really the first at-a-distance instant communication.⁶³ It was so expensive that mainly newspapers, in particular the Associated Press, used it to share stories.⁶⁴ The Associated Press came together with the telegraph monopoly, Western Union, to crush rival newspapers.⁶⁵ The situation was eventually remedied through Supreme Court decision-making⁶⁶ and through Congress opening the telegraph up as a common carrier.⁶⁷

Radio had several different access rules. The spectrum was designed to promote local stations,⁶⁸ often to the detriment of more

61. *Id.*

62. 47 C.F.R. § 21.2 (2001).

63. *Morse Code and the Telegraph*, HISTORY.COM, <http://www.history.com/topics/inventions/telegraph> (last visited Jan. 15, 11:00 AM).

64. *See id.*; see also Menahem Blondheim, *Rehearsal for Media Regulation: Congress Versus the Telegraph-News Monopoly*, 56 FED. COMM. L.J. 299, 305–06 (2004).

65. ANNTERESA LUBRANO, *THE TELEGRAPH: HOW TECHNOLOGY INNOVATION CAUSED SOCIAL CHANGE* 72–73 (1997).

66. *See Pensacola Tel. Co. v. W. Union Tel. Co.*, 96 U.S. 1, 10–13 (1877) (invalidating a Florida statute which gave one corporation exclusive access to telegraphic transmissions based on conflict with the Commerce Clause and federal law).

67. Mann-Elkins Act, Pub. L. No. 61-218, § 7, 36 Stat. 539, 544–45 (1910). When developing the Mann-Elkins Act of 1910, Congress gave the Interstate Commerce Commission (ICC) control over communications while simultaneously identifying telegraph providers as common carriers. *Id.*

68. ROBERT BRITT HORWITZ, *THE IRONY OF REGULATORY REFORM: THE DEREGULATION OF AMERICAN TELECOMMUNICATIONS* 171 (1989).

national stations,⁶⁹ by way of substantive decisions about how licenses were handed out.⁷⁰ The initial AM radio—AM radio was super-popular until the 1980s and is still popular for talk radio now⁷¹—had a mix of national, local, and regional radio stations to craft different kinds of speech, and the FCC encouraged local speech.⁷²

Cable systems, too, have to abide by specific rules that the courts have upheld,⁷³ including the requirement that they carry broadcast stations.⁷⁴ (For younger readers: local TV stations were once available for free using an antenna,⁷⁵ while others were only available if you paid for cable.⁷⁶) The justification for that was similar to that for a limited public forum.⁷⁷ The courts forced cable companies like Comcast to carry

69. *Id.*

70. *Id.*

71. Revitalization of the AM Radio Service, 28 FCC Rcd. 15221, 15222 (2013), available at <http://www.fcc.gov/document/commission-adopts-nprm-revitalize-am-broadcast-radio-service>, (“In the mid-1980s, AM radio represented 30 percent of the nation’s radio listening hours. By 2010, that number had dropped to 17 percent, with AM radio comprising only 4 percent of listening hours among younger Americans. . . . Today, AM radio remains an important source of broadcast entertainment and information programming, particularly for locally oriented content. . . . For example, all-news/talk, all-sports, foreign language, and religious programming formats are common on the AM band.”).

72. See FEDERAL COMMUNICATIONS COMMISSION, HISTORY OF THE BROADCAST LICENSE APPLICATION PROCESS, KPMG LLP ECONOMIC CONSULTING SERVICES, 18 (2000) (“Diversification of control of mass media was of primary importance as a factor in the comparative hearing process. Therefore the ownership rules had a very significant effect on determining who could apply for a broadcast license.”); see also Amendment Of Sections 73.34, 73.240, and 73.636 Of The Comm’n’s Rules Relating To Multiple Ownership Of Standard, FM and Television Broadcast Stations, 50 F.C.C.2d 1046, 1075 (1975) (an opinion encouraging divestiture of media ownership with an emphasis on local stations).

73. See generally Albert N. Lung, *Must-Carry Rules in the Transition to Digital Television: A Delicate Constitutional Balance*, 22 CARDOZO L. REV. 151 (2000).

74. *Id.* at 152–53.

75. See, e.g., Stuart Minor Benjamin, *Evaluating the Federal Communications Commission’s National Television Ownership Cap: What’s Bad for Broadcasting Is Good for the Country*, 46 WM. & MARY L. REV. 439, 502 (2004).

76. *Id.*

77. See, e.g., *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 749–51 (1996) (analogizing between public forum cases and the treatment of broadcast stations, ultimately reserving judgment on the comparison).

these broadcast stations in order to provide local content and promote localism, as well as promoting diversity and antagonistic sources.⁷⁸ Those are both principles having to do with the architecture of who can speak to whom with or without whose permission—not purely government censorship of disfavored content. Cable also has to carry public-access channels, which two Supreme Court justices have likened to designated public forums.⁷⁹ Educational channels and governmental channels, on the other hand, are more like limited public forums on those platforms. Likewise, satellite TV systems are required to set 3 percent of their space aside for nonprofit educational programming,⁸⁰ very much like a limited public forum. Congress even made the telegraph subject to common carrier rules.⁸¹

Then came the Internet. The Internet was built on top of the phone network.⁸² This is why users initially had to access the Internet by dialing up an Internet service provider (ISP) through a phone line.⁸³ ISP

78. See Comcast Cable Comm'ns, 19 FCC Rcd. 5245, 5253–54 (2004); see also Paul Cowling, *An Earthy Enigma: The Role of Localism in the Political, Cultural and Economic Dimensions of Media Ownership Regulation*, 27 HASTINGS COMM. & ENT. L.J. 257, 307–08 (2005).

79. See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(11), 106 Stat. 1461 (1992); Denver Area Educ. Telecomms. Consortium, Inc., 518 U.S. at 791–92 (Kennedy, J. concurring in part and dissenting in part).

80. Carriage of Noncommercial Educational Television, 47 U.S.C. § 535 (2012).

81. See *Moore v. New York Cotton Exchange*, 270 U.S. 593, 605 (1926) (“As a common carrier of messages for hire, the telegraph company, of course, is bound to carry for all alike. But it cannot be required—indeed, it is not permitted—to deliver messages to others than those designated by the sender.”).

82. ACLU, *No Competition: How Monopoly Control of the Broadband Internet Threatens Free Speech*, 3, available at <https://www.aclu.org/files/FilesPDFs/nocompetition.pdf>. (“Using the dial-up system, consumers access the Internet by connecting directly to their Internet Service Providers (ISPs).”). See also, Martin Campbell-Kelly & Daniel D. Garcia-Swartz, *The History of the Internet: The Missing Narratives*, 28 J. OF INFO. TECH. 26 (2013) (“From 1984 on, it was possible for bulletin boards [(the original form of a website)] to connect to one another by low-speed telephone networks [via the Internet.]”).

83. Campbell-Kelly & Garcia-Schwartz, *supra* note 82, at 29 (indicating that beginning in 1991 and moving into the mid-nineties, private companies (such as IBM and MCI) began developing programs and became Internet Service Providers (ISPs)).

companies like AOL, EarthLink, and NetZero had legal powers to speak over the phone network, which was owned by companies like AT&T.⁸⁴ Then, *Reno v. American Civil Liberties Union*,⁸⁵ the first major Supreme Court decision about the Internet, ruled that anyone with a phone line can essentially be a town crier—not anyone who gets the permission of the phone company.⁸⁶

All of this shows fairly intense planning, thinking, and engagement on the part of Congress and the FCC. This is more complex than the simplistic idea that the principle we should always adopt is that government should just stay out of speech.

One other architectural principle that is relevant to net neutrality is the idea that everyone should have access to speech spaces, virtual or not. On top of that, people can lobby for and get *new* speech spaces added, and these spaces are not limited to designated public forums. Cable companies are often required, when they contract with a city, to serve everyone, even poor people and people who live in neighborhoods they'd rather not serve.⁸⁷ They have brought First Amendment challenges saying, essentially, "You're forcing us to speak to people we don't want to speak to. We should get *Turner* scrutiny. We should not be forced to build out."⁸⁸ They won a few cases about a decade ago in district courts around this idea that government shouldn't compel them to speak to people they don't want to speak to.⁸⁹ I think that's clearly wrong. There's a long tradition of governments forcing cable

84. *See id.*

85. 521 U.S. 844, 870 (1997).

86. *Id.* ("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."). The Court in *Reno* held that the cases at hand provided no legitimate basis for tempering the level of scrutiny under the First Amendment that is applied to communication and speech on the Internet. *Id.* The Court further specified that individuals who are *using* the phone line become virtual "town crier[s]," and do not have to obtain permission from the phone companies first. *Id.*

87. 47 U.S.C. § 214(e) (2014).

88. *See generally* Comcast Cablevision of Broward Cnty., Inc. v. Broward Cnty., 124 F. Supp. 2d 685 (S.D. Fla. 2000).

89. *See, e.g.,* Time Warner Entm't Co. v. FCC, 240 F.3d 1126 (D.C. Cir. 2001); Time Warner Cable Inc. v. FCC, 729 F.3d 137 (2d Cir. 2013); Comcast Cablevision of Broward Cnty., Inc. v. Broward Cnty., 124 F. Supp. 2d 685 (S.D. Fla. 2000).

companies⁹⁰ and phone companies to build out to everyone⁹¹ and taxing some people's speech (such as business, long-distance, or international calls) to subsidize other kinds of speech, such as local speech.⁹²

This tradition stems from the much earlier tradition of post roads. The U.S. Constitution gives the government the authority to build post roads—that is, roads to new areas to deliver mail, thus expanding the network of the Postal Service.⁹³ The idea was to offer one cheap service to all people.⁹⁴ The United States built more postal roads than any other country.⁹⁵ It was a national commitment, even mentioned in the Federalist Papers:⁹⁶ more newspapers and more postal roads⁹⁷ to serve the unprecedented size of this new democracy.⁹⁸ Because small city-states had been democracies,⁹⁹ and larger countries had mainly not been

90. See Gerry Smith, *Many Rural AT&T Customers Still Lack High-Speed Internet Despite Merger Promise*, THE HUFFINGTON POST (Nov. 18, 2012, 9:30 AM), http://www.huffingtonpost.com/2012/11/18/rural-att-customers-merger-Internet_n_1914508.html.

91. See Jennifer Waters, *Prepare to Hang Up the Phone, Forever*, THE WALL STREET JOURNAL (Mar. 29, 2014, 8:48 PM), <http://www.wsj.com/articles/SB10001424052702303325204579465321638954500>.

92. See Lawrence Gasman, *Why the Telecommunications Act is Failing*, CATO INST. (Jan. 6, 1997), <http://www.cato.org/publications/commentary/why-telecommunications-act-is-failing>.

93. U.S. Const. art. I, § 8, cl. 7. See also *Universal Service and the Postal Monopoly: A Brief History*, U.S. POSTAL SERVICE (Oct. 2008), <https://about.usps.com/universal-postal-service/universal-service-and-postal-monopoly-history.pdf>.

94. *Universal Service and the Postal Monopoly: A Brief History*, *supra* note 93.

95. *Id.*

96. THE FEDERALIST NO. 14 (James Madison). (“Roads will everywhere be shortened, and kept in better order; accommodations for travelers will be multiplied and meliorated; an interior navigation on our eastern side will be opened throughout, or nearly throughout, the whole extent of the thirteen States. The communication between the Western and Atlantic districts, and between different parts of each, will be rendered more and more easy by those numerous canals with which the beneficence of nature has intersected our country, and which art finds it so little difficult to connect and complete.”).

97. *Universal Service and the Postal Monopoly: A Brief History*, *supra* note 93.

98. THE FEDERALIST NO. 14 (James Madison).

99. THE FEDERALIST NO. 10 (James Madison).

democracies,¹⁰⁰ a crucial component to make the fledgling nation work was to bind the nation together through speech and community using the postal network—and, later, broadcasting.¹⁰¹

The first principle of broadcast licensing was that every community should have a station.¹⁰² This core principle should apply to the Internet as much as to any other communication network. The legal test here should be much like the limited-public-forum test or the designated-public-forum test: is it viewpoint-neutral and does it promote at least one of these architectural core principles of promoting spaces for speech, promoting spaces for democratic speech, and ensuring all Americans can communicate with one another? The principle should not be that government should stay out of speech, which is definitely not what the precedent gives us. We need government intervention to encourage or permit more of us to communicate, regardless of our views, in a way that doesn't privilege some content over other content. In other words, I do not think that *Turner* scrutiny should apply to net neutrality or to Internet regulation of the cable and phone companies.

The three kinds of scrutiny are strict scrutiny, intermediate scrutiny, and rational basis. Strict scrutiny requires a compelling governmental interest and usually a least restrictive means to advancing that interest. It is reserved for viewpoint-based discrimination and suppression of speech based on content. It is seen as a high standard, and laws tend not to pass strict scrutiny. Rational basis scrutiny requires merely a legitimate governmental interest and a rational relation between the means and the interest. It's a low standard, and laws tend to survive it.

100. *Id.* (“The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.”)

101. THE FEDERALIST NO. 44 (James Madison) (listing the post office as a way the federal government may regulate the activities of individuals).

102. *See supra* notes 73–80 and accompanying text.

Turner scrutiny is intermediate scrutiny.¹⁰³ As noted earlier, this requires an important interest and narrow tailoring to that important interest, which can always be one of the architectural principles—promoting diverse sources and dissemination of speech to all. In the one medium to which we’ve applied *Turner* scrutiny, however—cable—what ends up happening is that the cable companies challenge every single regulation and law as burdening their speech because they claim that it is not narrowly tailored enough or that there isn’t enough substantial evidence of an important interest.¹⁰⁴ The Supreme Court came up with this test in a cable case¹⁰⁵ and since then the D.C. Circuit has had to address a constitutional challenge to price regulations on cable companies because, according to the cable companies, if you are taking money away from them they cannot speak more.¹⁰⁶ The D.C. Circuit actually struck down two ownership limits¹⁰⁷ that barred cable companies from buying up networks that covered more than thirty percent of the United States¹⁰⁸ after the companies argued that not being allowed to speak to thirty-one percent of Americans burdened their speech. The problem with this argument is that it fails to give any regard to all of the other speakers who also have speech interests: other cable companies, broadcasters, and the people.¹⁰⁹

Does net neutrality pass *Turner* scrutiny? Sure, it does. Does it promote one of these key architectural values? It promotes wide dissemination of speech; it promotes diverse and antagonistic sources. I do not believe it burdens more speech than necessary, as it must burden the cable companies’ “editorial” discretion completely to keep the Internet open and neutral.

Yet, *Turner* is not the right standard. The right standard is more in line with designated public forums, phone systems, large public malls, and the postal network. Network neutrality falls right in line with

103. *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 189 (1997) (“We begin . . . applying the standards for intermediate scrutiny . . .”).

104. *See, e.g., Cablevision Sys. Corp. v. FCC* 570 F.3d 83, 97 (2nd Cir. 2009).

105. *See, e.g., Turner*, 520 U.S. 180.

106. *Time Warner Entm’t Co. v. FCC*, 56 F.3d 151, 161 (D.C. Cir. 1995) (*per curiam*).

107. *Comcast Corp. v. FCC*, 579 F.3d 1 (D.C. Cir. 2009); *Time Warner Entm’t Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001).

108. *Comcast*, 579 F.3d at 3.

109. *Id.* at 9.

existing precedent. It is not viewpoint-based. It is not even content-based: it benefits all content alike. The supposed burden on cable companies therefore is not part of the test.

So that is my argument for why everything you have learned about the First Amendment is wrong. Take a broader view, because the instinct you have—that Verizon's argument must be stupid and wrong—is true.