The Year in “First Amendment Architecture”

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CITE AS: 2012 STAN. TECH. L. REV. 6

1 2011’s “Person of the Year,” according to *Time Magazine*, was “The Protestor.”1 That year, protestors across the world led and persisted through the historic Arab Spring. From Tunisia to Egypt and beyond, these protestors may have spawned a democratic awakening in the Middle East.2 They took to physical spaces like Tahrir Square in Cairo and to virtual spaces on Facebook and Twitter to express their dissent and assemble against undemocratic regimes. Closer to home, in response to economic turmoil, the perceived unfairness and cronyism of the bank bailouts, and the perceived corruption of our political system in the wake of the Supreme Court’s *Citizens United* ruling, protestors led the Occupy movement, holding demonstrations in spaces across the nation. They protested at Occupy Wall Street in New York’s Zuccotti Park, at Occupy K Street in DC’s McPherson Square, as well as Occupy San Antonio and Occupy Los Angeles, among hundreds of other spaces.3 The protestors did not speak in physical spaces—they organized virtually. Occupy Wall Street famously began with a tweet—just as the Arab Spring began with a video.4 Occupy managed to shift America’s political center of gravity away from the Tea Party discourse of 2010 and change the political scene in DC (much as the Tea Party had previously done so through protests in public spaces nationally).

2 The many Occupy protests were part of a larger movement at home. Activists also flocked to Wisconsin’s state capital in support of teachers unions and teachers’ deferred compensation against controversial cost-cutting proposals made by the state’s governor.5 Protests erupted on college campuses such as the University of California, Davis, where police officers infamously pepper

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sprayed peaceful protesters who withstood the officers and chanted at them, “This is our space, not yours.” And virtual speech spaces, in particular cell phone networks in San Francisco subway stations, were targeted by the city’s police, who shut down the systems to thwart a protest. This action prompted a public debate in newspapers, radio stations, and television networks regarding the scope of First Amendment protection and interpretation of forty-year old precedents in the age of cell phones. In all these examples, the right to freedom of speech would have been meaningless without access to physical and virtual spaces to speak.

The right to freedom of speech should be meaningful in a democracy, not meaningless. This right is widely believed necessary for informed, organized self-government. There are many conceptions of democracy, along a range including formal conceptions requiring little more than periodic voting and more substantive conceptions focused on real equality and meaningful participation in political decision-making and individual liberty. Free speech doctrine can serve more formal or more substantive conceptions. The courts interpreting that doctrine can give the legislature greater or lesser deference in adopting rules affecting freedom of speech, based on the courts’ conception of democracy and the First Amendment. Courts can provide deference for some decisions and not others, based on the courts’ own conceptions.

I recently argued that the courts should permit government to open additional physical and virtual spaces widely to all Americans for speech. Courts should permit government to open both publicly owned and privately owned virtual and physical spaces—from public parks to private broadband networks. Courts should require government to ensure at least some spaces for reflection and discourse, such as private homes and public parks and squares. Further, speech spaces should be available to all Americans despite wealth or geography, open to a diversity of antagonistic speakers, and tailored for political discourse of local and national controversies. As a matter of descriptive law, the courts have in fact made decisions in line with these principles.

As a matter of democratic theory, ensuring ample spaces for all speakers, alongside diversity and universality, promotes a substantive conception of democracy in line with our Constitution’s highest ideals. On the other hand, courts may defer to government policies to close otherwise “open” public spaces by creating caged “free speech zones.” Courts may strike down government policies opening up otherwise “private” virtual spaces, based largely on assumptions about the priority of property rights and treating property rights as “trumps” over speech rights. Such arguments were made explicit in Professor Lillian Bevier’s critique of my argument. While property rights advance freedom as an institution—an insight recognized since feudalism—government created property rights consist of majoritarian social policies. In a post-Lochner jurisprudence, such judicial...
roadblocks should give way to government attempts to further the First Amendment interests of more Americans being able to participate in our democracy.

¶6 Judicial doctrine should require access to spaces such as Zuccotti Park and public squares. Today, the “openness” of Zuccotti Park seemed to rest on a legal loophole rather than carefully considered constitutional judgment. It should also permit government wide latitude to regulate private spaces—including the communications networks supporting virtual spaces—without an exacting flavor of “Turner scrutiny” that the courts have sometimes wrongly imposed on rules opening up the cable platform. Not only should the courts defer to government attempts to promote additional speech spaces, and not only have courts historically done so since the founding of the Republic, but there are good reasons for courts not taking even more aggressive roles determining the rules and regulations governing virtual speech spaces. Professor Gregory Magarian has made strong arguments for judicial policy-making for speech platforms, but I doubt courts have the competence to do so.

¶7 The core question we should focus on is whether all Americans have plentiful spaces for speech, access to diverse sources of speech, and the ability to participate in public discourse. This past year, millions of people expressed their political dissent to the powerful in physical and virtual spaces. The question of what kind of democracy we should have—a question asked here and in nations around the world—is a question we do not answer once and for all. We struggle to give answers every day through personal and collective decisions. Determining the scope of our individual free speech rights, and the general architecture of our free speech system, is fundamental to determining the kind of democracy we are capable of achieving.

¶8 My research in First Amendment Architecture can provide guidance to judges, legislators, concerned citizens—organizers and protestors among others—not only in understanding the events of 2011 but also in guiding the events of 2012 and beyond. This article therefore summarizes and defends the arguments raised in First Amendment Architecture. In that article, I argue that First Amendment doctrine embodies principles that empower or require government to ensure Americans have access to spaces to speak. This includes access to speech spaces on publicly owned property and privately owned property, and on both physical spaces and on virtual spaces like digital forums. I argue that these principles embodied in doctrine are substantive, reflecting notions of an open, inclusive speech environment, and that these overlooked principles in precedent should inform us of what the First Amendment means and should mean in the 21st Century.

¶9 This article consists of four parts. The first part presents the example of a concrete, high profile legal question. The second discusses how our conventional normative framework would address that concrete question or similar questions. The third provides evidence for a different normative framework rooted in overlooked but important principles in our free speech tradition. The fourth argues those principles as worth defending.

I. CONCRETE HIGH-PROFILE CONTROVERSY

¶10 In December of 2010, after almost 10 years of debate and litigation, the Federal Communications Commission (FCC) adopted network neutrality rules. Those rules are currently up on appeal. Network neutrality refers to a rule that would keep the Internet open by forbidding cable and telephone companies from discriminating in favor of or against certain sites or software. During

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18 See Turner Broad. Sys., Inc. v. FCC (Turner I), 512 U.S. 622 (1994); First Amendment Architecture, supra note 9, at 79.
the years of debate, and on appeal, defenders and critics raised arguments invoking the First Amendment.

¶11 Those in favor of network neutrality called it the Internet’s First Amendment or the First Amendment issue of our time. In 1997, the Supreme Court characterized the Internet as “a unique medium—known to its users as ‘cyberspace’—located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet.”

Network neutrality would preserve open access to these digital speech spaces. The network neutrality law would preserve history’s greatest engine of free expression and political deliberation, the open Internet that has shaped our own elections, supported an Arab Spring, and so much more.

¶12 Those opposed to network neutrality in the United States had a different view. They argued that adopting a network neutrality law would in fact violate the First Amendment, and that telephone and cable companies transmit speech. Government should not be involved in regulating speech, and network neutrality is government regulation. In fact, to them, network neutrality was an especially dangerous regulation because it would invite government to regulate some of our most important virtual forums for speech.

II. FAILURE OF CURRENT LAW

¶13 In analyzing this concrete problem, we can rely on two words that law professors use: descriptive and normative. Both of these words are necessary to ensure freedom of speech in the 21st Century. Descriptive analysis is analysis of what the law is. Normative analysis concerns what the law ought to be. We evaluate a law based on metrics or norms that we apply. For example, for economic analysis of law, we might apply the norm of Kaldor-Hicks efficiency, or low prices, to evaluate a proposed law or determine whether a case is correctly decided.

¶14 For normative analysis with freedom of speech, we don’t use efficiency but other norms. We could use highly general norms, like whether a case promotes democratic deliberation or individual autonomy. We generally use more administrable, mediating norms that are a little more specific. And scholars often derive those more administrable norms from our First Amendment tradition. They look to venerable or “bedrock” First Amendment principles and use them as evaluating norms. Many scholars generally conclude that the venerable principles from our tradition point in the same direction—that government should keep its hands off of speech. Said another way, these bedrock norms reflect a negative liberty—a freedom from government interference. And we can see these norms most clearly in canonical cases we read in law school, those involving suppression of speech for offensive speakers, flag burners, funeral protestors, pornographers.

¶15 Some scholars have pointed to other, more affirmative strains in our tradition in other cases, particularly those governing mass communications—and these scholars are no slouches, including Yochai Benkler, Cass Sunstein, Ed Baker, Owen Fiss, Jack Balkin, and others. They might note that government is involved in speech lots of ways, from government speech to subsidized speech to areas directly affecting speech spaces, such as maintaining public forums, designating public forums, licensing and shaping the most important media of the 20th Century, like broadcast radio and television, and other major media, including a history of involvement in newspapers through the postal service. But the conventional view seems to be that these are mere “exceptions”—even though these exceptions govern very important speech spaces.

¶16 If negative liberty is our norm, it should be the norm for new technologies. The Internet consists primarily of private speech over private infrastructure. If government must keep out of such private speech, these negative-liberty norms would disempower the government and all of us from designing the 21st Century’s most important virtual speech spaces to serve us all. Several important technology
laws would be constitutionally problematic under these norms. Not just network neutrality, but also data-roaming, privacy, interconnection, unlicensed wireless underlays, and text message blocking (which Verizon made famous years ago by refusing to deliver text messages from a pro-choice organization).  

III. DESCRIPTIVE ANALYSIS OF KEY ARCHITECTURAL PRINCIPLES

First Amendment Architecture tries to address this challenge from a particular perspective. The normative analysis in part two rests on a descriptive claim about First Amendment doctrine and precedent. The descriptive claim is that our venerable precedent and doctrine reflect a negative-liberty norm—subject to some “exceptions.” But that’s not the best way to understand our First Amendment tradition. There are a lot of so-called exceptions, more than usually assumed, and they govern many of the most important speech forums.

The point of this analysis is not that I have made complete sense of First Amendment precedent. It is simply to demonstrate that there are principles strongly evident in the doctrine that empower or require government to make physical and virtual speech spaces more widely available to more speakers. Like the negative liberty principle, these principles too are “venerable” and “bedrock” principles in doctrine that we should not simply ignore. Previously I identified five principles, which are briefly presented here.

The first principle is that government is constitutionally required to ensure that any citizen has some minimal space to gather and speak. Even in a content-neutral way, government can’t close the streets and parks in any town. This includes not just municipal towns, but also towns owned by private companies—at one point, there were over two thousand company towns in the country. While the first principle requires government to do something, the other principles I identify are all discretionary. They permit government to do things, subject to some judicial limits. The second principle is that government may open additional spaces for speech beyond these basic minimum spaces. These spaces can be governmentally or privately owned, and can be physical or virtual spaces. Government may designate publicly owned spaces to speech—like an amphitheater—or designate government spaces to particular speakers or classes of speakers, such as limited public forums, for students or others. States can pass statutes, or constitutional provisions, that open shopping malls to all speakers, and in doing so create private physical speech spaces. You can look at the telegraph, the telephone system, wireless and some broadcast rules, and some cable rules to see examples of virtual spaces. Complex laws provide access for all of us to speak through the telephone company’s property, removing its ability to edit or censor us. There are many examples of government opening privately owned spaces, and these are not obscure exceptional areas but central to our speech experience today, and through our history. The third principle, very briefly, is that government may extend spaces universally to all speakers. The fourth principle is that government may create forums for national and local discourse. The fifth is that government may ensure diverse sources in spaces, through access rules and ownership limits.

All of these principles are subject to a judicial rule against suppressing particular content or benefiting particular viewpoints. For examples of the last three principles, universality, local forums, and diversity, consider the phone network, what is actually a major speech medium, and not just because of robocalls. There’s a multi-billion dollar universal service fund and complex subsidies and taxes to make sure all Americans have phone service, reflecting the principle that government can extend spaces universally. The FCC has shifted these subsidies for broadband Internet. These subsidies tax some speakers to benefit other speakers. Price regulation favored local calls. Numerous ownership limits and access rules ensure more diverse speakers.  

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22 Id.
23 Id. at 29-34.
24 Id. at 34-45.
25 Id. at 51-53.
¶21 We could also look, historically, to the postal service. The postal service is not constitutionally required, and it’s a governmental institution. Until radio and television came along, the postal “spaces” carried news to citizens. Government designated these spaces to newspapers with special, huge subsidies unavailable to letters and advertisements. Congress built out postal roads to the most remote parts of the nation, to connect everyone to newspapers. Congress itself would debate these newspaper subsidies based on highly speech sensitive considerations that burdened some speakers to benefit others. The government was deeply involved in promoting newspapers.26

¶22 None of these five principles, which have deep roots in precedent and history, reflects mere negative liberty. All of them burden some speakers to increase availability of spaces to other speakers. All of them further substantive conceptions of a preferred speech environment, and have been either permitted or required by courts.

IV. NORMATIVE DEFENSE AND IMPLICATIONS

¶23 The existence of these principles in precedent suggests that government has played a role in shaping new virtual speech forums, and they challenge the usual negative liberty norms that people often apply to new cases and proposed laws.

¶24 These five principles themselves are normatively defensible. To evaluate them normatively, we can appeal to higher-level principles such as democracy and autonomy. There are a lot of different conceptions of democracy and autonomy, but these principles further some widely accepted conceptions of democracy and autonomy. Democracy and autonomy are served through sufficient spaces, additional designated spaces, and universally available spaces, for both local and national forums, open to diverse speech sources. Turning from higher principles to concrete cases, government actions that further these principles, such as network neutrality, are actions that strike a lot of people as furthering our 21st Century First Amendment rights. Indeed, I think the courts should more consistently follow these principles—both in physical spaces like occupied parks and in digital spaces. For example, we should not apply heightened scrutiny to a range of Internet policy rules.

¶25 Beyond a normative defense, there are theoretical implications of these principles, if we take them seriously. These theoretical implications are not just an academic exercise. What’s at stake here is the basic authority of the people to debate and determine what the constitution means, what our communications values should be, and how we should implement them in designing new virtual spaces. First, theoretically, these principles demonstrate that norms of negative liberty or affirmative liberty might not be such helpful concepts. Government must keep its hands off speech sometimes, and not other times, and we must determine when government may act and how it can act.

¶26 Second, we should all be involved in designing the speech spaces available to us in our democracy. Our speech tradition shows that government has played a central role in opening spaces and shaping access to them. Some of our most important speech protections are statutory not judicial—from the postal rules through common carrier rules. Government has entrenched and furthered constitutional principles like universal access to sufficient speech spaces, diversity of sources, and the need for national and local discourse. The government has engaged in censorship, but in some very positive actions. Tasking the legislature with a role empowers the public to be involved in debating these important questions concerning our democracy.

¶27 In sum, the government could be deeply involved in shaping access to the vital virtual spaces of our time. The usual normative argument against government involvement rests on a mistaken descriptive premise about the normative principles evident in precedent. In fact, First Amendment precedent evidences several principles deeply concerned with ensuring adequate physical and virtual spaces for speech. These principles not only should inform our understanding theoretically of what the First Amendment means but also of what the First Amendment should mean in the 21st Century.

26 Id. at 37-39.
What the First Amendment should mean is that the protestor, the organizer, and the average citizen—rather than the government bureaucrat in a government agency or judicial robe—should be the Person of the Year every year in our democracy.