Fordham Urban Law Journal

Volume 41
Number 5 *Symposium - Smart Law for Smart Cities: Regulation, Technology, and the Future of Cities*

Article 1

March 2016

Government-Provided Internet Access: Terms of Service as Speech Rules

Enrique Armijo
Elon University School of Law

GOVERNMENT-PROVIDED INTERNET ACCESS: TERMS OF SERVICE AS SPEECH RULES

Enrique Armijo[*]

Introduction 1500
I. A Taxonomy of Government-Provided Digital Speech Spaces 1504
II. Forum Doctrine: Not the Answer 1508
III. First Amendment Rules for Government-Provided Internet Access 1513
A. The First Amendment Interest in Nondiscriminatory Speech Carriage 1513
B. A Workable Nondiscrimination Principle for Digital Speech Carriage 1514
IV. Public-Private Internet Access Partnerships and State Action 1515
V. Terms of Service as Speech Rules and the Unconstitutional Conditions Doctrine 1520
Conclusion 1524

---

[*] Assistant Professor, Elon University School of Law, Affiliate Fellow, Yale Law School Information Society Project; earmijo@elon.edu. Thanks to colleagues at the Smart Law for Smart Cities Symposium, as well as the FCC/American Enterprise Institute/University of Nebraska College of Law Regulating the Evolving Broadband Ecosystem Conference, the Yale Information Society Project's 2014 Freedom of Expression Scholars' Conference, and the Santa Clara Law-New York Law School 2014 Internet Law Works-in-Progress Conference, and to my co-presenters at the 2014 Southeastern Association of Law Schools' "Terms of Service as Speech Rules" panel, for comments, insights, and encouragement. Individual thanks go to Jack Balkin, Derek Bambauer, Olivier Sylvain, Sharon Gillett, Ellen Goodman, Margot Kaminski, Neil Richards, and Berin Szoka, and to the public records officers in the many cities and departments who provided contracts, terms of service, calls for proposals, ordinances, and other documents in response to records requests. Thanks too to Spenser Tatum, Brittany Teague, and Elizabeth Long, as well as Cindy Hirsch in the Elon Law Library, for outstanding research help. Finally, my appreciation to the editors at the Fordham Urban Law Journal for the opportunity to be a part of this important project.

INTRODUCTION

On December 10, 2013, then-Mayor Michael Bloomberg of New York City announced the largest continuous free outdoor public WiFi network in the United States.[1] The network, covering most of the Harlem neighborhood, will extend 95 city blocks and reach nearly 80,000 residents, including 13,000 public housing occupants, as well as businesses in and visitors to the area.[2] The project is a joint initiative of the City's Department of Information Technology and Telecommunications, its Technology Development Corporation, and the private Internet Service Provider Sky-Packets, which will provide access to and manage traffic over the network on the City's behalf.[3] In announcing the project, former Mayor Bloomberg noted that the project would provide "24/7 access to everything from education materials for kids, to information about Harlem's rich history and attractions, to everyday needs like paying bills [and] checking library hours."[4]

The Harlem WiFi project, while notable in its scope, is consistent with a growing trend: government-provided access to high-speed Internet service is on the rise in cities of all sizes. Citizens are coming to expect "robust and ubiquitous wireless connectivity."[5] This is due in large part, of course, to the explosion in demand for faster mobile wireless access through smartphones—ownership of which increased from 16% of Americans in 2009 to 56% in 2013, a trend roughly consistent with the introduction and rising popularity of the iPhone.[6]

These offerings are taking a range of forms. One approach is a purely public utility model, i.e., government owned-and-operated, mostly city-wide "municipal broadband" networks built out and

---

1. *See Mayor Bloomberg Announces Country's Largest Continuous Free Public WiFi Network*, NYC.GOV (Dec. 10, 2013), http://www1.nyc.gov/office-of-the-mayor/news/394-13/mayor-bloomberg-country-s-largest-continuous-free-public-wifi-network/.

2. *Id.*

3. *Id.*

4. James Eng, *Largest Free Public Wi-Fi Network in US Coming to Harlem*, NBC NEWS (Dec. 10, 2013), http://www.nbcnews.com/tech/internet/largest-free-public-wi-fi-network-us-coming-harlem-f2D11723755.

5. Open Tech. Inst. & CTC Tech. & Energy, *The Art of the Possible: An Overview of Public Broadband Options*, NEW AM. FOUND. 19 (May 6, 2014), http://newamerica.net/sites/newamerica.net/files/policydocs/TheArtofthePossible-OverviewofPublicBroadbandOptions_NAFOTI-CTC.pdf.

6. Aaron Smith, *Smartphone Ownership 2013*, PEWRESEARCH INTERNET PROJECT (June 5, 2013), http://www.pewinternet.org/2013/06/05/smartphone-ownership-2013/; *see also* Open Tech. Inst. & CTC Tech & Energy, *supra* note 5, at 19.

managed by cities themselves, such as Chattanooga, Tennessee and Lafayette, Louisiana.[7] Another is the increasingly common public-private partnership, such as Harlem WiFi, where a private Internet Service Provider (ISP) provides Internet access via Hotspot in a particular public space such as a neighborhood, business district, park, town hall, or transportation hub, thereby aggregating smaller service areas within their city limits,[8] in cooperation with a municipality or its administrative subsidiary, at low or no cost to the user.[9] As Mayor Bloomberg noted with respect to Harlem WiFi, all of these projects are undertaken for manifestly public purposes, from education to economic development.[10] In addition, an underlying motivation on the part of policymakers is likely the fear of being left behind. Businesses, residents, and visitors are increasingly expecting high-speed Internet connections in public spaces, and city leaders seem to believe that if they don't build it, those businesses, residents, and visitors will not come.

Concurrent with these efforts is the growing debate over direct governmental provision of high-speed Internet service, due in part to the lack of incentives for private ISPs to finance network build-outs and improve capacity in rural areas.[11] Advocates of "fiber-to-the-home" (i.e., direct high-speed residential Internet connections provided via fiber optic cable) for all Americans have called for additional public investment of nearly one hundred billion dollars in federal funding, much of which would go to government-owned and

---

7. *See* Brian Fung, *How Chattanooga Beat Google Fiber by Half a Decade,* WASH. POST (Sept. 17, 2013), http://www.washingtonpost.com/blogs/the-switch/wp/2013/09/17/how-chattanooga-beat-google-fiber-by-half-a-decade/; *see also* LAFAYETTE UTIL. SYS. FIBER, http://lusfiber.com (last visited Oct. 17, 2014).

8. *See, e.g.*, *infra* note 25 (discussing, *inter alia*, efforts by Chicago, Illinois; Cambridge, Massachusetts; Kennesaw, Georgia; and Newton, North Carolina).

9. For a detailed study of three large cities' recent efforts to provide free WiFi to residents, see SUSAN CRAWFORD ET AL., HARVARD UNIVERSITY BERKMAN CENTER FOR INTERNET & SOCIETY, RESEARCH PUB. NO. 2014-9, COMMUNITY FIBER IN WASHINGTON, D.C., SEATTLE, WA, AND SAN FRANCISCO, CA: DEVELOPMENTS AND LESSONS LEARNED (May 27, 2014), http://cyber.law.harvard.edu/publications/2014/community_fiber; *see also infra* note 68 (discussing WiFi and cellphone service in New York subway system provided via partnerships between the Metropolitan Transit Authority and private carrier TransitWireless).

10. *See infra* notes 67–70 and accompanying text.

11. *See* American Recovery and Reinvestment Act of 2009, 47 U.S.C. § 1305 (2012); FED. COMMC'NS COMM'N, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN 135 (2010), *available at* http://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf; Grant Gross, *FCC Votes to End Telephone Subsidies, Shift to Broadband*, PCWORLD (Oct. 27, 2011, 12:00 PM), http://www.pcworld.com/article/242713/fcc_votes_to_end_telephone_subsidies_shift_to_broadband.html.

operated networks.[12] To those advocates, the Federal Communications Commission ("FCC")'s seeming abdication of its commitment to network neutrality in April 2014[13] has highlighted to an even greater degree the need to expand municipal-level, utility-run networks. In addition, the FCC itself seems ready to exercise its federal preemption authority to protect municipal broadband efforts from statewide laws that have inhibited municipal broadband networks in several states[14]—a proposal that the U.S. Council of Mayors has recently endorsed.[15] For those who believe a subsidy approach has not succeeded in ensuring high-speed Internet access to

---

12. *See, e.g.*, SUSAN CRAWFORD, CAPTIVE AUDIENCE: THE TELECOM INDUSTRY AND MONOPOLY POWER IN THE NEW GILDED AGE 255–57 (2013); *see also* Sam Gustin, *Is Broadband Internet Access a Public Utility?*, TIME (Jan. 9, 2013), http://business.time.com/2013/01/09/is-broadband-internet-access-a-public-utility/; Alex Marshall, *Who Should Control Broadband?*, GOVERNING MAG. (Apr. 2013), http://www.governing.com/columns/eco-engines/col-public-or-private-sector-who-controls-broadband.html.

13. *See, e.g.*, Marvin Ammori, *The Case for Net Neutrality: What's Wrong With Obama's Internet Policy,* FOREIGN AFF. (July/Aug. 2014), http://www.foreignaffairs.com/articles/141536/marvin-ammori/the-case-for-net-neutrality.

14. *See* Susan Crawford, Op-Ed., *The Wire Next Time*, N.Y. TIMES, Apr. 27, 2014, http://www.nytimes.com/2014/04/28/opinion/the-wire-next-time.html?_r=0; Tom Wheeler, Chairman, Fed. Commc'ns Comm'n, Remarks Before the National Cable & Telecommunications Association (Apr. 30, 2014), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-326852A1.pdf; Tom Wheeler, *Removing Barriers to Competitive Community Broadband*, FCC.GOV BLOG (June 10, 2014), http://www.fcc.gov/blog/removing-barriers-competitive-community-broadband. Two communities that wish to provide broadband service to other municipalities have already asked the FCC to preempt state laws they view as obstructive of that goal, and the Commission has opened a proceeding to consider those requests. *See* Petition Pursuant to Section 706 of the Telecommunications Act of 1996 for Removal of State Barriers to Broadband Investment and Competition, filed by Electric Power Board, Chattanooga, Tennessee, WC Docket No. 14-116 (filed July 24, 2014); Petition Pursuant to Section 706 of the Telecommunications Act of 1996 for Removal of State Barriers to Broadband Investment and Competition, filed by City of Wilson, North Carolina, WC Docket No. 14-115 (filed July 24, 2014).

15. *See* TRANSP. & COMMC'NS COMM., 82ND ANNUAL MEETING OF THE U.S. CONFERENCE OF MAYORS, RESOLUTION ON PRESERVING A FREE AND OPEN INTERNET 257 (June 2014), *available at* http://www.usmayors.org/82ndAnnualMeeting/media/resolutions-final.pdf; *see also* Susan Crawford, *How Cities Can Take On Big Cable,* BLOOMBERGVIEW (June 27, 2014), http://www.bloombergview.com/articles/2014-06-27/how-cities-can-take-on-big-cable (citing letter sent by Democratic congressional leaders to FCC asking agency to preempt state laws in order to encourage municipal broadband development); Andrew Zaleski, *Is Municipal Broadband More Important than Net Neutrality?*, FORTUNE (June 26, 2014), http://fortune.com/2014/06/26/is-municipal-broadband-more-important-than-net-neutrality/.

all Americans, direct government provision of fiber-based service seems to be the only solution.[16]

This "fundamental makeover" of public places from exclusively physical spaces to mixed spaces with both physical and online aspects is "alter[ing] the nature, character, and democratic functions of public places and public expression," in a range of ways that are not yet apparent.[17] More practically, it also raises the question whether the management of these networks is subject to the restraints of the Constitution, and if so, what limitations the First Amendment would place on interferences with speech carried by those networks. After all, at their most basic, the networks are speech spaces, provided either in name or in fact by the State; they are publicly owned property over which citizen expression travels. Though the constitutional questions would seem to logically follow from that premise, we seem reluctant thus far to ask them.

Considering the Constitution's applications to these new speech spaces also raises a host of subsidiary questions, all of which are, to this point, unresolved. For example:

- Are government-provided Internet networks public fora?
- Where a private ISP is the service-provider-in-fact for a nominally "public" Internet access point, is the ISP a state actor for that purpose?
- If so, does the First Amendment limit the ISP's capacity for content-based interferences with traffic over its network, even if the interference is intended to prevent lawless conduct by users or others?
- And if users must accede to the prospect of such interferences ex ante in exchange for access pursuant to the municipality's and/or the network's terms of service, are the doctrines of unconstitutional conditions and prior restraint implicated thereby?

---

16. *See* Crawford, *The Wire Next Time*, *supra* note 14 ("It's clear that fiber networks are a natural monopoly and need to be either run directly by the government, or so heavily regulated that it amounts to the same thing.").

17. Timothy Zick, *Clouds, Cameras, and Computers: The First Amendment and Networked Public Places*, 59 FLA. L. REV. 1, 5 (2007); *see also* Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 8 (2004) (noting that information communications technology lowers "the costs of transmission, distribution, appropriation, and alteration of information" because "[digital] speech is participatory and interactive. People don't merely watch (or listen to) the Internet as if it were television or radio. Rather, they surf through it, they program on it, they publish to it, they write comments and continually add things to it.").

The answers to these questions—and to forecast a bit, this Article's answers to all but the first are "yes"—have important implications for public safety, free expression, and digital development in our urban spaces. Both network managers and users need to understand these issues so as to shape their conduct in these twenty-first century speech spaces accordingly. In the rush to embrace dynamic communications technologies that enable us to leave behind temporal and spatial limitations on speech, we risk losing sight of the Constitution's commands. If we do so, and accept these State-provided digital speech spaces as part of our communications infrastructure without thinking through the relevant First Amendment questions, we will sacrifice historical protection and respect for freedom of speech from governmental interference at the altar of the new.

Part I of this Article provides, by way of background, a taxonomy of the arrangements that municipalities are using to provide free WiFi access to their citizens. Part II examines whether these networks are public fora, and thus whether the special First Amendment rules imposed by the public forum doctrine apply to them. Part III sketches out some rules for network administrators to apply in order to comply with the First Amendment. Part IV considers the state action doctrine with respect to public-private networks, and concludes the obligations set out in Part III would apply to both the "municipal broadband" networks owned and operated by municipalities and, more controversially, to private ISPs offering free Internet access on behalf of local governments. Finally, Part V contemplates the interaction between contract and constitutional law that is raised by terms of service between government Internet access providers and members of the public.

I. A TAXONOMY OF GOVERNMENT-PROVIDED DIGITAL SPEECH SPACES

As noted above, broadband deployment has been a federal priority for many years. More recently, however, an increasing number of local governments have begun their own initiatives. Back in 2003, Sharon Gillett and her MIT colleagues classified these efforts on the local level into four categories based on the "role[] of government *vis a vis* broadband: as user, rulemaker, financier, and infrastructure provider."[18] The role of "infrastructure provider" included not simply

---

18. Sharon E. Gillett et al., *Local Government Broadband Initiatives*, 28 TELECOMM. POL'Y 537 (2004), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2063217. Gillett uses the term "user" broadly, to mean

the local government's "manage[ment of the] design, funding, and construction" of broadband access for its citizens, but also operation of the network—i.e., the broadband network owner and service provider.[19] More recently, the New America Foundation's Open Technology Institute, which advocates for public broadband adoption, classified public broadband similarly, noting models "rang[ing] from a centrally coordinated government initiative to a shared partnership between a private entity and a local government."[20]

With respect to the "infrastructure provider" category, both Gillett et al.'s and the Open Technology Institute's research noted a familiar split between those municipalities that provided direct broadband service and those that did not. The majority of the former were smaller communities that were underserved or unserved by the private ISP market because of their size and/or geography; there, "the public sector probably provides broadband . . . because no one else does."[21] Twenty years ago, supermajorities of voters in rural municipalities underserved by private ISPs approved bonds to finance public broadband networks in their communities that would be operated and administered by the public utilities serving their communities.[22] By contrast, larger communities that were better served by commercial providers were taking less active coordination-and-facilitation roles, such as granting infrastructure rights to private ISPs, providing subsidies or other in-kind preferences to commercial projects, or aggregating citizen demand to sweeten the business case for private ISPs reluctant to enter their markets—what Gillett et al. considered "user," "financier," or "rulemaker" roles.[23]

The functional split between large and small towns with respect to broadband access, however, has decreased in salience over the past ten years. Cities and counties of all sizes are now developing free

---

government as "stimulator of demand," as either "buyer, facilitator of aggregation [of service areas by commercial ISPs serving the municipality], or "lead user." *Id.* at 8.

19. *See id.* at 5.

20. Open Tech. Inst. & CTC Tech. & Energy, *supra* note 5, at 7.

21. Gillett et al., *supra* note 18, at 36.

22. Steven C. Carlson, *A Historical, Economic, and Legal Analysis of Municipal Ownership of the Information Highway*, 25 RUTGERS COMPUTER & TECH. L.J. 1, 7–8 (1999) (citing approval rates of 88% in Alta, Iowa, and 94% in Muscatine, Iowa, the latter despite the incumbent cable company's outspending of proponents by over 100 to 1); *see also* John Blevins, *Death of the Revolution: The Legal War on Competitive Broadband Technologies*, 12 YALE J.L. & TECH. 85, 104 (2009) ("[L]iterally hundreds of cities . . . announced plans for various types of municipal broadband projects—most of them wireless networks.").

23. *See* Gillett et al., *supra* note 18, at 1.

WiFi networks at a rapid pace, both on their own and in collaboration with private operators.[24] Larger cities, even those that are arguably well-served by the private wireless market, are providing their own broadband access points to the public, often by aggregating smaller service areas within their city limits.[25] Furthermore, the municipally owned-and-operated network model is no longer limited to those communities where incentives for private sector network rollouts are lacking, as evidenced by, for example, San Francisco's new free municipally-built and owned WiFi service along Market Street.[26] Pursuant to these efforts, as of 2011, over 125 municipalities offered city-wide WiFi,[27] and more than 75 cities had large outdoor WiFi Hotspots, mostly in parks and downtown areas.[28]

---

24. *See, e.g.*, Sharon E. Gillett, *Municipal Wireless Broadband: Hype or Harbinger?*, 79 S. CAL. L. REV. 561, 565–81 (2006); Josh Constine, *Google Pays $600K to Give Free Wi-Fi to 31 San Francisco Parks*, TECHCRUNCH (July 24, 2013), http://techcrunch.com/2013/07/24/free-wifi-san-francisco-google; Joanna Stern, *New York City Pay Phone Booths Now Free WiFi Hotspots*, ABC NEWS (July 11, 2012), http://abcnews.go.com/Technology/york-city-pay-phone-booths-now-free-wifi/story?id=16756016#.Ud7X-DvR2So.

25. *See, e.g.*, *Cambridge Public Internet (CPI) WiFi Access Points*, CAMBRIDGEMA.GOV, http://www.cambridgema.gov/itd/CPI.aspx (last visited Oct. 15, 2014). For an example of the City of Chicago's approach, see Greg Hinz, *City Unveils Plan For Free Wi-Fi, Wider Super-Fast Internet*, CRAIN'S CHI. BUS. (Sept. 24, 2012, 3:30 PM), http://www.chicagobusiness.com/article/20120924/BLOGS02/120929936/city-unveils-plan-for-free-wi-fi-wider-super-fast-internet; Dep't of Procurement Servs., City of Chi., *Request for Information (RFI) for Broadband Infrastructure Expansion*, CITY OF CHICAGO, http://www.cityofchicago.org/content/dam/city/depts/dps/ContractAdministration/Specs/2012/Spec111304.pdf (detailing intended coverage areas throughout Chicago); Press Release, Mayor's Press Office, Mayor Emanuel Announces Chicago Broadband Challenge (Sept. 24, 2012), http://www.cityofchicago.org/content/dam/city/depts/mayor/Press%20Room/Press%20Releases/2012/September/9.24.12broadbandchallenge.pdf. Smaller cities are following an aggregation strategy as well. *See, e.g.*, *About Us*, KENNESAWWIFI.NET, http://www.kennesawwifi.net/about.html (last visited Oct. 15, 2014). For a map showing WiFi access points in the City of Newton, North Carolina, see *City of Newton*, MERAKI, http://p13.meraki.com/network/CityofNewton (last visited Oct. 15, 2014).

26. *See* John Coté, *S.F. Rolls Out 3 Miles of Free Wi-Fi Along Market Street*, S.F. CHRON. (Dec. 16, 2013), http://www.sfgate.com/bayarea/article/S-F-rolls-out-3-miles-of-free-Wi-Fi-along-Market-5067616.php#photo-3584032; *San Francisco Wi-Fi*, SFGov, http://www6.sfgov.org/index.aspx?page=246 (last visited Oct. 15, 2014).

27. *See* Olivier Sylvain, *Broadband Localism*, 73 OHIO ST. L.J. 795, 805 (2012) (citing CHRISTOPHER MITCHELL, PUBLICLY OWNED BROADBAND NETWORKS: AVERTING THE LOOMING BROADBAND MONOPOLY (2011)).

28. Esme Vos, *Updated List of US Cities and Counties with Large Scale WiFi Networks*, MUNIWIRELESS.COM (June 7, 2010), http://www.muniwireless.com/2010/06/07/updated-list-of-cities-and-counties-with-wifi/ [hereinafter Vos, *Updated List*]; Esme Vos, *AT&T Launches Free WiFi in New York City Parks*,

The business aspects of the joint venture-type arrangements for broadband service differ according to the nature of the agreement between the municipality and its commercial partner. Cities sometimes entice private companies to offer these services to the public in exchange for their own government telecommunications contracts.[29] In other arrangements, private telecommunications providers donate hardware and/or service for publicly owned networks.[30] Some commercial partners also build out and operate networks for cities in return for the right to display advertising or locally focused content to users.[31] The "functional boundary" between government and the private sector with respect to these networks is thus largely contract-dependent, and can differ widely from network to network.[32] However, a common characteristic among these efforts is the municipality offering the service in its own name, but contracting the building and/or operation of the network to the private sector.[33]

It is certainly likely that the conceptual shift from direct government city-wide service to mixed service models is attributable to legislative lobbying by ISPs, which has restricted or effectively barred municipalities in nearly twenty states from owning and operating their own broadband networks.[34]

MUNIWIRELESS.COM (June 9, 2011), http://www.muniwireless.com/2011/06/09/att-launches-free-wifi-in-new-york-city-parks/.

29. *See* Gillett et al., *supra* note 18, at 11 (discussing aggregated municipal units as "anchor tenants" for commercial telecommunications services, and the benefits municipalities negotiate in exchange for such arrangements).

30. This is also true with respect to publicly owned networks. *See, e.g.*, Coté, *supra* note 26.

31. *See, e.g.*, *Microsoft and MetroFi Team Up on Free Wireless Internet in Portland, Ore.*, MICROSOFT, (Nov. 14, 2006), https://www.microsoft.com/en-us/news/press/2006/nov06/11-14metrofipr.aspx. However, the private ISP operating the ad-supported free wireless network on behalf of Portland went out of business. *See* Jacqueline Emigh, *In Portland, Oregon, Another City-wide Wi-Fi Network Bites the Dust*, BETANEWS, http://betanews.com/2008/02/22/in-portland-oregon-another-city-wide-wi-fi-network-bites-the-dust/ (last visited Oct. 15, 2014).

32. Gillett et al., *supra* note 18, at 18.

33. For a more in-depth discussion of these arrangements, see *infra* notes 67–75 and accompanying text.

34. *See, e.g.*, François Bar & Namkee Park, *Municipal Wi-Fi Networks: The Goals, Practices, and Policy Implications of the U.S. Case*, 61 COMM. & STRATEGIES 107, 107 (2006) (detailing the growing number of municipal WiFi networks in the U.S. and abroad), *noted in* Michael A. Janson & Christopher S. Yoo, *The Wires Go To War: The U.S. Experiment with Government Ownership of the Telephone System During World War I*, 91 TEX. L. REV. 983, 987 n.18 (2013); Gillett et al., *supra* note 18, at 19–20; Susan Crawford, *U.S. Internet Users Pay More for Slower Service*, BLOOMBERGVIEW (Dec. 27, 2012, 6:30 PM), http://www.bloombergview.com/articles/2012-12-27/u-s-internet-users-pay-more-for-slower-service (detailing Time

However, in both types of cases—government-as-infrastructure-provider, where a municipality acts as network operator, and government-as-joint-venture-partner, where a commercial operator manages the network on the government's behalf—citizens will use these networks to transmit First Amendment-protected speech. The next three Parts of this Article set out some of the constitutional issues raised by this fact and suggest possible ways to resolve them.

II. FORUM DOCTRINE: NOT THE ANSWER

With respect to whether the First Amendment should apply to municipal Internet networks, public forum doctrine would seem to offer one path. However, as I have argued previously, it seems clear (at least to me) that State-provided Internet networks, offered either directly by a municipal utility or in partnership with a private ISP as the service-provider-in-fact, are neither traditional nor designated public fora.[35] Forum doctrine comes from the theory of easement: when the public openly uses public space for communication, it earns a type of speech easement by prescription, which remains available for subsequent members of the public to use to communicate.[36] The State, as owner of the servient estate, cannot then eject speakers from that space for content-based reasons.[37] The presence or absence of historical use of the space or similar spaces for speech, as manifested in traditional public forum doctrine, is thus dispositive. Where the claim is that the government has designated a space for speech, intent to grant the public general access to the space for that purpose must be present, or no forum will be found.[38]

Warner's successful efforts in the North Carolina legislature to pass a law banning municipal broadband service in that state, and noting that "[e]ighteen other states have laws that make it extremely difficult or impossible for cities to provide this service to their residents."); Jesse Drucker, *Wireless Warrior*, WALL ST. J., Feb. 13, 2006, *available at* http://online.wsj.com/article/SB113943275592368690.html ("[L]egislatures in at least 14 states and Congress proposed legislation to restrict municipal wireless efforts."). By one account, at least thirty-five states have considered such legislation. *See* Blevins, *supra* note 22, at 110 n.127 (citing FED. COMMC'NS COMM'N, BRINGING BROADBAND TO RURAL AMERICA: REPORT ON A RURAL BROADBAND STRATEGY 53 n.308 (2009)).

35. *See generally* Enrique Armijo, *Kill Switches, Forum Doctrine, and the First Amendment's Digital Future*, 32 CARDOZO ARTS & ENT. L.J. 411 (2014).

36. *See* Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 13 (1965).

37. Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 45 (1983).

38. Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677 (1998) (citing Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985)).

With these rules (admittedly overgeneralized here) in place, it is unlikely that a government-provided Internet network would be deemed a public forum by a reviewing court. The modernity of a space nearly always eliminates it from traditional public forum eligibility. Additionally, so far as designated public forum status, cases like *United States v. American Library Association*,[39] *United States Postal Service v. Greenburgh Civic Associations,*[40] and *Denver Area Educational Television Consortium v. FCC*[41] treat State-provided speech spaces such as Internet public library terminals, the Postal Service, and public access television channels as access information points rather than networked exchanges. These findings cut against concluding the spaces at issue in those cases were designated public fora since, as discussed, a public forum needs a speech easement, and a speech easement by designation must be intended to serve both speakers and listeners.[42]

However, even if a municipal WiFi network cannot be a traditional or designated public forum, even *nonpublic* fora—property owned or controlled by the government, but "not by tradition or designation a

---

39. *See* 539 U.S. 194, 206 (2003).

40. *See* 453 U.S. 114, 129 (1981).

41. *See* 518 U.S. 727, 740 (1996) (Breyer, J., plurality opinion); *id.* at 768 (Stevens, J., concurring) ("I am convinced that it would be unwise to take a categorical approach to the resolution of novel First Amendment questions arising in an industry as dynamic as this."); *id.* at 777 (Souter, J., concurring) ("[N]ot every nuance of our old standards will necessarily do for the new technology, and . . . a proper choice among existing doctrinal categories is not obvious."); *id.* at 779–80 (O'Connor, J., concurring) ("[W]e should not yet undertake fully to adapt our First Amendment doctrine to the new context we confront here."); *id.* at 829–30 (Thomas, J., concurring in the judgment in part and dissenting in part, joined by Scalia, J., and Rehnquist, C.J.) ("We have expressly stated that neither government ownership nor government control will guarantee public access to property . . . . [U]nlike a park picketer, an access programmer cannot transmit its own message. Instead, it is the operator who must transmit, or 'speak,' the access programmer's message.").

42. As the Court said in *American Library Association,* providing Internet access at library terminals no more designates a public forum than "collect[ing] books" designates a "public forum for the authors of [the] books to speak." 539 U.S. at 206. Rather, the terminals were intended "to facilitate research, learning, and recreational pursuits" for *patrons*. *Id.* at 195. There was no intent, in other words, to foster the speech of website developers or open a communications channel between those developers and library patrons. *See generally id.* Similarly, in *Greenburgh*, the Court stated that its cases did not support the "sweeping proposition" that "simply because an instrumentality is used for the communication of ideas and information, it thereby becomes a public forum." 453 U.S. at 130 n.6.

As I have previously noted, *Denver Area Consortium* convincingly demonstrates that the Court's refusal to find new speech spaces to be traditional public fora has bled into its designated public forum analysis, which has completed the "erosion of forum doctrine's categorical approach to speech rights on public property." Armijo, *supra* note 35, at 440.

forum for public communication"[43]—impose some restrictions on the State's ability to interfere with speech. In particular, the State may exclude speakers from nonpublic fora so long as the exclusion is reasonable and viewpoint-neutral.[44] Accordingly, a municipality may restrict speech or speakers from its network, but if that network is deemed a nonpublic forum, the speaker may not be excluded if, for example, the speaker criticizes the municipality or its officials. Likewise, any content-based parameters that the municipality imposes on the network will be judged by a reasonableness standard;[45] for example, it would likely be found reasonable for a city to block access to constitutionally protected but offensive content in a public space such as a park or downtown area, out of concerns that unsupervised children might be able to view the material.[46] Some content-based proscriptions on network use, on the other hand, such as a ban on using the network to organize a protest or nonviolent public disruption, might be found unreasonable. Nonpublic forum analysis, in other words, applies only to the State's worst offenses against free expression.

The current easement-derived understanding of forum doctrine compels the conclusion that municipally provided Internet networks are not public fora. However, other, more expansive interpretations of the doctrine might prove more protective. For example, some scholars have argued that the historical public trust doctrine is a better way to resolve speech-in-public-space questions than the forum doctrine.[47] Public trust doctrine derives from Roman and English law, which stripped the King's power to prohibit common public uses of rivers, seas, and shores, in effect making sovereign ownership of those lands in trust for the public's benefit, rather than in fee.[48] Extrapolated to free speech debates, a public trust doctrine approach to speech on public property would call for sublimating State-owned

---

43. Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 46 (1983).

44. *Id.*

45. *See* Lyrissa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975, 1991 (2011).

46. *Cf. id.* at 2000–02 (citing cases where public order, decorum, and civility-related rules validly infringed on citizen's otherwise protected speech in the context of city council or other governmental meetings). To use an earthbound analogy, the First Amendment does not foreclose a "no nude dancing on the playground" rule. *See* FCC v. Pacifica Found., 438 U.S. 726, 749 (1978) (holding that the government has important interest in protecting children from indecent material).

47. *See generally* Marie A. Failinger, *New Wine, New Bottles: Private Property Metaphors and Public Forum Speech*, 71 ST. JOHN'S L. REV. 217, 312–13 (1997).

48. *See* Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559, 647 (1995) (citing Failinger, *supra* note 47, at n.423 and accompanying text).

management of its property to citizens' choices with respect to the content of their communication because the State's "ownership" of the property is fiduciary in nature and subject to the interest of its trustees—here, the public.

Though public trust doctrine perhaps sounds like a more noble methodology to apply to First Amendment questions, it offers much less in the way of actually answering them in the particular context of network management and ex ante interferences with digital speech. For example, would the State be barred from momentarily blocking access to Facebook in a particular public space if the site were being used to coordinate or otherwise incite imminent collective action in that space that might be criminal in nature? On the one hand, the State is clearly interfering with its trustees' right to free speech; on the other hand, other trustees, who would otherwise suffer from the conduct the speech was in the process of facilitating, would be mighty grateful. When members of the public have opposing interests, the public trust model fails to tell us which trustee wins out. Alternatively, one could argue that as a matter of both First Amendment law and democracy-promoting information policy, the State, as owner of property in public trust, is obliged to establish what Jack Balkin calls an "infrastructure of free expression" that bars content-based interferences with citizen speech using public space, or at the very least those that are applied to speech ex ante.[49] In the end, however, and in either case, the public trust approach to forum questions seems to assess the costs and benefits associated with the State's speech interferences—a task our existing levels of First Amendment scrutiny already perform.

Similarly, forum doctrine is often read to permit the government to bar those uses of its property that are incompatible with the property's intended use.[50] With respect to speech carried over a municipal broadband network, there is no prima facie incompatibility. The State establishes, develops, and designs the network to carry data, and the expressive activity for which the network is intended to be used is indistinguishable as a technical matter from those purposes.

---

49. Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296, 2301 (2014); Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427, 432 (2009).

50. *See* Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 819–20 (1985); *see also* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 698 (1992) (Kennedy, J., concurring) ("If the objective, physical characteristics of the property at issue and the actual public access and uses that have been permitted by the government indicate that expressive activity would be appropriate and compatible with those uses, the property is a public forum.").

One wonders, however, whether a court reviewing a municipality's content-related restrictions on the use of its network could be trusted to operate at such a speech-favorable level of abstraction.

For example, assume a network's enabling legislation states that the municipality intended to offer Internet access to, per the above, provide "24/7 access to everything from education materials to kids, to information about Harlem's rich history and attractions, to everyday needs like paying bills [and] checking library hours."[51] Would a policy that barred use of the network to promulgate the "depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion" be "incompatible" with the municipality's intended use?[52] Incompatibility analysis in forum doctrine cases has often focused on *physical* incompatibility between the intended expression and the government's intended use of the public property—e.g., in-person solicitation of travelers is incompatible with the purpose of an airport terminal, which is to ensure those travelers can promptly reach their flight gates.[53] The reason for that limitation, of course, is that those cases dealt with physical spaces. In the virtual context, a government could easily make the argument that some expression is incompatible with the government's intended purposes for the property because of the expression's content. As noted, if the property is deemed to be a nonpublic forum, a reviewing court would uphold reasonable content-based proscriptions on expressive uses of the property.

Despite all that, even though courts might find that a State-provided communications network is a public forum under either the easement approach or another, nominally speech-friendlier approach, there is a significant risk that the doctrine would be applied only to the physical space from which the speaker "speaks," rather than to the networked space that the speaker and listener share.[54] Since we

---

51. Eng, *supra* note 4.

52. Beauharnais v. Illinois, 343 U.S. 250, 251 (1952).

53. *See Lee*, 505 U.S. at 685.

54. For an example of this analysis, consider Bay Area Rapid Transit's responses to claims that it violated the First Amendment when it turned off its cellphone service repeaters when it received word of a protest within its train stations in August 2011. BART claimed that there was no First Amendment violation because its train platforms were established to facilitate transportation rather than speech, and thus were neither traditional nor designated public fora. *See* Bob Franklin, *A Letter from BART to Our Customers*, BAY AREA RAPID TRANSIT (Aug. 20, 2011), http://www.bart.gov/news/articles/2011/news20110820 ("BART has designated the areas of its stations that are accessible to the general public without the purchase of tickets as unpaid areas that are open for expressive activity upon issuance of a permit subject to BART's rules.").

are not necessarily dealing with shared physical spaces in the context of online speech, forum doctrine thus undervalues, if not ignores, the listener's rights to receive information—a result that does violence to the freedom-of-assembly-protective principles underlying forum doctrine in the first place.[55] If forum doctrine is anything, it is path-dependent. Hence, with forum doctrine off the table, we are left with the plain old First Amendment and the question of whether it applies to these spaces on its own terms.

III. FIRST AMENDMENT RULES FOR GOVERNMENT-PROVIDED INTERNET ACCESS

A. The First Amendment Interest in Nondiscriminatory Speech Carriage

If the State carries the messages of speakers, then case law confirms that the First Amendment compels nondiscriminatory treatment of those messages. For example, in *Lamont v. Postmaster General*, a federal statute empowered the Postmaster General to confiscate foreign-originated mail that he deemed to be "Communist propaganda," of which a recipient could request delivery, upon receiving notice of confiscation.[56] The *Lamont* petitioner, a pamphleteer who received notice of the Post Office's confiscation of his copy of the *Peking Review*, sought to enjoin the statute's enforcement, arguing that it violated his First Amendment right to receive information. The Supreme Court unanimously agreed, noting that "[t]he 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 . . . ."[57]

Independent of forum doctrine, the First Amendment mandates that government not discriminate in its carriage of user speech. This conclusion is supported by the doctrine of common carriage, which requires the government to provide access to its services without making "individualized decisions in particular cases [concerning]

---

55. As the Court said in its primary case adopting the doctrine, the public forum is intended to preserve associational spaces for "assembly, communicating thoughts between citizens, and discussing public questions." Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939); *see also* Ashutosh Bhagwat, *Associational Speech,* 120 YALE L.J. 978, 1015–16 (2011) ("[I]t is assembly, not the actions of a street-corner speaker, that is at the heart of the public forum doctrine.").

56. Lamont v. Postmaster Gen. of U.S., 381 U.S. 301 (1965).

57. United States *ex rel.* Milwaukee Soc. Democratic Pub. Co. v. Burleson, 255 U.S. 407, 437 (1921) (Holmes, J., dissenting).

whether and on what terms to serve" members of the public.[58] With respect to the carriage of *speech*, the federal government has long since decided that freedom from government interference is essential to the development of the mail system.[59] The same rule necessarily applies to speech transmitted digitally. As a service open to all, a public broadband network must not discriminate among users or constitutionally protected content carried by that network.

Despite this rule, which amounts to a First Amendment-informed network management principle, a network operator must have the technical ability to protect the network and its users against attacks. Viruses and malware interfere with other users' speech over the network, granting what I have previously called a "hacker's veto" over lawful speech-related uses.[60] Thus, despite the First Amendment's application to these speech spaces, the State's network operator should be free to make content-neutral technical management decisions that have the effect of keeping a network safe and operable. Such decisions would likely be permissible as time/place/manner restrictions under ordinary First Amendment doctrine.

B. A Workable Nondiscrimination Principle for Digital Speech Carriage

If the First Amendment is a network management principle for municipally provided Internet networks, the question remains how that principle should be put into effect. This Subpart outlines these obligations in greater detail.

Thanks to technological advances in deep packet inspection, there is no doubt that ISPs have the ability to examine, "on a 'real time' basis, both routing information . . . [and] the actual content contained in . . . every packet that traverses the ISP's network."[61] The issue then

---

58. Jonathan S. Marashlian et al., *The Mis-Administration and Misadventures of the Universal Service Fund: A Study in the Importance of the Administrative Procedure Act to Government Agency Rulemaking*, 19 COMMLAW CONSPECTUS 343, 368 (2011).

59. This principle was manifested in the Postal Clause's granting of a public monopoly in postal service to the Congress, *see* U.S. CONST. art. I, § 8, cl. 2, which "put the federal government in the common carrier business." ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM 17 (1983); *see also* Armijo, *supra* note 35, at 443–45.

60. Armijo, *supra* note 35, at 446.

61. *See* Rob Frieden, *Invoking and Avoiding the First Amendment: How Internet Service Providers Leverage Their Status as Both Content Creators and Neutral Conduits*, 12 JOURN. OF CONSTITUTIONAL L. 1279, 1311-12 (2010). "Deep packet inspection" technology permits network providers to identify both the applications

turns to ensuring that the State exercises this capacity in a speech-protective way. As I have argued previously, to use a framework proposed by Thomas Nachbar and propounded in the debates around network neutrality, State-run communications networks must be: (1) user-neutral—i.e., that the network should provide continuous service to any user seeking to connect to it, to the extent such service is technologically feasible; and (2) use-neutral—i.e., that the network should not bar devices or applications of any type from being used on it, except for those that would threaten the stability of the network.[62] Because the network is owned and/or operated by the State, the user- and use-based discrimination rules should track the rule, which currently governs in physical public space: punishing users for accessing or disseminating illegal or otherwise unprotected speech over the State's network must occur ex post. In other words, the preemptive denials of access that would, in a non-digital context, be treated as prior restraints, namely, content-based disconnection or denials of carriage, should be presumptively barred.

IV. PUBLIC-PRIVATE INTERNET ACCESS PARTNERSHIPS AND STATE ACTION

If State-run Internet networks may not discriminate on the basis of content, there remains the question of which networks, other than those provided directly by a municipality pursuant to the utility model, should be considered "State-run."[63] In the case of public-private partnerships, the answer is clear: where the municipality and its service-provider-in-fact enjoy an "overlapping identity" with respect to the service, and the municipality undertakes to provide Internet access pursuant to its residents' general welfare, then the private partner is a state actor bound by the First Amendment to the same degree as the State would be had it provided the service itself.[64]

---

used on their networks and the content that users transmit often in real time, using keyword searches and other monitoring techniques. Using DPI, the network operator has the ability to decide which applications or content will be transmitted and at what speed. *See id.*; *see generally* M. Chris Riley & Ben Scott, *Deep Packet Inspection: The End of the Internet as We Know It?*, FREE PRESS, (Mar. 18, 2009), http://www.freepress.net/sites/default/files/fp-legacy/Deep_Packet_Inspection_The_End_of_the_Internet_As_We_Know_It.pdf.

62. Thomas B. Nachbar, *The Public Network*, 17 COMMLAW CONSPECTUS 67, 127–28 (2008); *see also* Armijo, *supra* note 35, at 462.

63. *Cf.* Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 11–15 (1978) (holding that a municipal utility is a state actor and thus obliged to comply with Due Process Clause when terminating a citizen's service).

64. *See* Lansing v. City of Memphis, 202 F.3d 821, 829 (6th Cir. 2000) (finding that the private actor's choice is "deemed to be that of the state" when the state

The "entwinement" approach to state action questions asks whether the contacts between the State and its private partner, in providing a service to the public, become so extensive that, as a matter of fairness, the latter's conduct is fairly attributable to the former.[65] With respect to public-private partnerships for high-speed Internet service, municipalities pass ordinances that enable their administrative subsidiaries to enter into contractual arrangements with private ISPs to provide Internet access, delivered in public spaces to any willing users at no cost.[66] They do so for quintessentially public reasons. As noted above, municipalities provide high-speed Internet access for the general public welfare, meeting social needs such as economic development,[67] public safety,[68] education,[69] and reducing the cost citizens would otherwise pay to purely private carriers for broadband access.[70] Those cities enter

---

"exercise[s] such coercive power or provide[s] . . . significant encouragement, either overt or covert").

65. *See id.*

66. *See* Evans v. Newton, 382 U.S. 296, 301 (1966).

67. *See, e.g.*, Chattanooga, Tenn., Res. No. 23446 (2002) (enacted), *available at* http://www.ilsr.org/rule/2515-2/ (finding that "local businesses consider the level of technological advancement of the City and the surrounding area when electing to remain" and that provision of "Internet services" will be "a significant, integral and necessary step in the City's economic development efforts"); San Jose, Cal., Request for Proposals # 13-14-12: Maintenance and Expansion of Downtown Wireless Network Utilizing Ruckus Wireless Equipment (Feb. 26, 2014), at 12 (wireless Internet service would "help drive economic impact in our community") (on file with author); Agreement for the Purchase and Installation of a Downtown WiFi Mesh Network By and Between the City of San Jose and SmartWave Technologies LLC (July 3, 2012), "Project Objectives," at 13 (service would "stimulate economic development" and help residents and visitors "to learn about downtown"); *id.* at 15, "City Responsibilities" (obligating city to promote "the use and value of wireless communications to enhance the Silicon Valley life") (on file with author).

68. *See* Matt Flegenheimer, *Wi-Fi and Cellphone Service on Subway Trains? M.T.A. Leader Says It May Happen*, N.Y. TIMES (Sept. 17, 2013), http://www.nytimes.com/2013/09/18/nyregion/mta-plans-wi-fi-and-phone-service-on-subway-trains.html?partner=rss&emc=rss&smid=tw-nytimes&_r=0 (stating that the M.T.A. frames expansion of wireless and cellphone service on trains "as a safety issue").

69. *See, e.g.*, S. 78, 2011 Gen. Assembly, ¶ 16 (Vt. 2011), *available at* http://www.leg.state.vt.us/docs/2012/Acts/ACT053.pdf.

70. *See, e.g.*, AMMON, IDAHO, CITY CODE § 8-9-1 (2011), http://www.ci.ammon.id.us/pdf/citycode/07012013AmmonCityCode.pdf (stating that the purpose of the law is to establish a City owned fiber optic system in order to, *inter alia*, "protect the cost of broadband services by eliminating anti-competitive pricing schemes or monopolistic practices which contribute to higher costs for broadband services."). With respect to this note and the one immediately preceding, it bears emphasis that where an action is "specifically authorized by an official exercising statutory authority," activity undertaken pursuant to that authority is "substantively a

partnerships with private entities to meet the same ends.[71] Public-private contracts for service delivery are of course not enough by themselves to render the private counterparty a state actor.[72] However, when the State receives benefits from the contract that extend well beyond the service delivery itself, then the private party's actions should be attributable to the State. And when those concomitant benefits are public in nature, the conclusion that the private party is a state actor should be readily reached.

As Justice Harlan's dissent in the Civil Rights Cases notes, where a "corporation or individual wield[s] power under state authority for the public benefit or the public convenience," the Constitution should apply to the corporation or individual's acts.[73] The arrangements at issue here provide significant public benefits. For example, in soliciting partners for the Wireless Corridor Challenge, a public access WiFi project intended to provide connectivity to several of the City's commercial districts, the New York City Economic Development Corporation stated that "in recent years WiFi . . . has become the newest urban requirement." "Better connectivity in the City's commercial districts," the EDC's model contract for the service continued, "will be critical to the City's businesses, residents and visitors, and to the City's ability to drive growth and innovation and to maintain its competitiveness."[74] An ambitious project that plans to place free WiFi Hotspots in New York City's 7000 public payphones will "help support job seekers, freelancers, residents in need of affordable broadband services, small businesses, the local tech

---

state action." Daphne Barak-Erez, *State Action Doctrine for an Age of Privatization,* 45 SYR. L. REV. 1169, 1173 (1995).

71. *See, e.g.*, City of New York Department of Information Technology & Telecommunications, Request for Proposals for a Franchise to Install, Operate, and Maintain Public Communications Structures in the Boroughs of the Bronx, Brooklyn, Manhattan, Queens, and Staten Island, PIN # 8582014 FRANCH 3 (April 30, 2014), at 3–6, http://www.nyc.gov/html/doitt/downloads/pdf/DoITT-Public-Communication-Structure-RFP-4-30-14.pdf [hereinafter Reimagining Payphones Project RFP].

72. *See* Dickerson v. Cal. Waste Solutions, No. C 08-03773 WHA, 2009 WL 2913452 (N.D. Cal. Sept. 8, 2009).

73. Civil Rights Cases, 109 U.S. 3, 59 (1883) (Harlan, J., dissenting).

74. New York City Economic Development Corporation Wireless Corridor Challenge Consultant Contract No. 55530001: Flatiron/23rd St. Partnership District Management Ass'n, App'x. B-2, "Goals and Objectives" (on file with author). As part of these agreements, the Corporation's counterparties were required to "identify populations" in the service area "that will benefit from the wireless network," and to "create projections to estimate the impact of the wireless network on commercial activity" in that area, "including the ability to attract new businesses to the neighborhood, connect commercial corridors, and increase foot traffic/marketing of [the served] business district." *Id.*, App'x. B-3-4, "Wireless Network Neighborhood Plan" (on file with author).

industry and visitors."[75] Similarly, the agreement establishing the aforementioned Harlem WiFi project, between New York City's Department of Information Technology and Telecommunication, Sky-Packets, and the Mayor's Fund to Advance New York City, notes that the Fund's goals are to "encourag[e], promot[e], and advanc[e] activities and programs to assist the City of New York in the implementation of civic improvements and social welfare programs and otherwise cooperating with the City in promoting the general welfare of the City's residents."[76] Social and general welfare are bedrock public purposes, even if New York City is meeting them with the assistance of a private ISP.[77] Public benefits and public burdens go hand-in-hand.

Counterarguments to this conclusion, however, are readily available. Per some cases applying the state action doctrine's "public function" inquiry, a private entity is not a state actor if the service it provides is not one that has been "traditionally *exclusively* reserved to the State."[78] Providing high-speed Internet is not an exclusive "traditional state function" and the example might be distinguishable on that basis.[79] If citizen access to high-speed Internet service is not a function that has been "traditionally the exclusive prerogative of the State"[80] in the same way as providing roads, parks, lights, water, or gas may be—and there is little doubt that it has not, given the longstanding dominance of private ISPs in our communications infrastructure—then a company providing it on the State's behalf might not be considered a state actor.[81] The traditional public function analysis, in particular the Rehnquist Court's emphasis on the exclusively sovereign nature of the function in question, carries real force as a limiting principle in state action questions.

---

75. Reimagining Payphones Project RFP, *supra* note 71, at 3–6, 18.

76. Harlem WiFi Agreement, p. 1 (Nov. 4, 2013) (alteration in original) (on file with author).

77. *See* Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 374 (1995) (holding that Amtrak is a state actor because it was created by statute and "explicitly for the furtherance of federal governmental goals").

78. Jackson v. Metro. Edison Co., 419 U.S. 345, 352 (1974) (emphasis added).

79. Marsh v. Alabama, 326 U.S. 501, 506 (1946) (finding the operation of "privately held bridges, ferries, turnpikes, and railroads" to be "essentially a public function"); *cf. Jackson*, 419 U.S. at 350 n.7. (finding "companies engaged in providing gas, power, or water; all common carriers, pipeline companies, telephone and telegraph companies, sewage collection and disposal companies; and corporations affiliated with any company engaging in such activities" are not engaged in traditionally exclusive State functions).

80. Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982).

81. *See Jackson*, 419 U.S. at 352.

Additionally, ever since its conceptual birth in the Court's Civil Rights Cases in 1883,[82] the state action doctrine has historically been more concerned with violations of the Fourteenth Amendment than of the First. Paradigmatic state action cases involve instances where the State has sought to preserve discriminatory practices and evade the Constitution's proscriptions of the same by offloading state functions to private actors. For example, in *Evans v. Newton*, a city had transferred operational control over a park to private trustees in order to avoid desegregating it, which would have been contrary to the "for whites only" terms of the park's establishing testamentary trust.[83] Despite the trustee's control over the space, however, the Supreme Court found that the private trustees were state actors because the park served a primarily public purpose.[84] Though *Newton* supports the conclusion argued here, as Rodney Smolla and Melville Nimmer have pointed out, the doctrine is viewed more expansively in the Equal Protection context than in the speech context.[85] No one would doubt, for example, that if Sky-Packets were to refuse to serve a particular area of Harlem as part of the Harlem WiFi project on the ground that the area was overwhelmingly made up of long-time African American residents, the Equal Protection Clause would be implicated, even though the City was not the service-provider-in-fact. It may not follow, however, that the First Amendment would apply with similar force to an analogous set of facts.[86]

Despite these counterarguments, it certainly seems true that the First Amendment should reach a private party that is transmitting speech on the State's behalf, particularly when the State is *holding itself out* as transmitter-in-fact to the public. Indeed, the state action doctrine's "public function" test was first adopted in a First Amendment case—*Marsh v. Alabama.*[87] To be sure, *Marsh* itself has been construed narrowly.[88] However, its core holding—that when a private party stands in the shoes of the State, the Constitution applies

---

82. *See* G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility,* 34 HOUS. L. REV. 333, 338–39 (1997).

83. *See* 382 U.S. 296, 297 (1966).

84. *Id.* at 301.

85. 1 RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 16:26 (2009).

86. *But see Jackson*, 419 U.S. at 373–74 (Marshall, J., dissenting) (doubting that "different standards [can] apply to state-action analysis when different constitutional claims are presented").

87. 326 U.S. 501 (1946).

88. *See, e.g.,* Cable Invs., Inc. v. Woolley, 867 F.2d 151, 162 (3d Cir. 1989).

to the party's conduct—remains salient. More recent decisions have turned away from an "all or nothing question of governmental exclusivity" to a more nuanced public function analysis, as well as a willingness to consider the combined weight of public function along with other state action factors like entwinement.[89] If state action jurisprudence continues in this direction, the mere fact that other private ISPs exist would not bar such an ISP from being found a state actor when it is providing citizens Internet access on a municipality's behalf.

Ultimately, the state action rule proposed by this Article is simple: if a municipality claims to provide high-speed Internet service to members of the public in its own name, and the municipality has pointed to important public purposes in delegating authority to the service-provider-in-fact, then the Constitution's demands should apply to that service. This is so not merely because a member of the public would reasonably observe the service to have been provided by the municipality, though that is certainly the case. The municipality in question, whether through its own service or by partnering with a private ISP to provide service, enjoys the public interest-related remunerations, as well as the political benefits, associated with high-speed Internet connectivity for its constituents. New York City and its political leaders can tout the benefits of connecting Harlem to WiFi, but along with those benefits should come the burdens of acting consistently with the First Amendment when managing the network—even if a private joint venture partner does the day-to-day managing. Without entwinement between a private ISP and the State, the Internet access provided by these networks would not exist at all.

V. TERMS OF SERVICE AS SPEECH RULES AND THE UNCONSTITUTIONAL CONDITIONS DOCTRINE

Like other ISPs, municipalities or their joint venture partners regularly require that users assent to contractual terms-of-use-based obligations as a precondition to network access. By defining what speech can and cannot be transmitted over the network, and by setting out the grounds by which the State can refuse a user access, these terms define the contours of users' First Amendment rights.

---

89. *Buchanan*, *supra* note 82, at 389–90 (discussing Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991) and Georgia v. McCollum, 505 U.S. 42 (1992)'s implicit rejection of an exclusivity requirement under public function analysis); *Id.* at 422–23 (discussing a "returning willingness by the Court to consider the combined weight of all state contact factors under state nexus analysis.").

For example, the city of Miami's terms of use for its Miami Beach WiFi network requires users to waive any claims against the City based on service disruptions:

> [Y]our access to the Service is completely at the discretion of the City, and your access to the Service may be blocked, suspended, or terminated at any time, at the sole discretion of the City, *without cause or for any reason including*, but not limited to, any violation of this Agreement, actions that may lead to liability for the City, disruption of access to other Users or networks, and violation of applicable laws or regulations . . . . *Service is subject to unavailability*, including emergencies, third party service failures, transmission, equipment or network problems or limitations, interference, lack of signal strength, and maintenance and repair, *and may be interrupted, refused, limited, or curtailed at any time*.[90]

Some terms of service for government-provided Internet access bar outright certain constitutionally protected expression. For example, the "Acceptable Use Policy" for the municipal utility-provided Chattanooga fiber optic network bars users from using the network to "transmit, distribute, or store material . . . that is," in addition to illegal, "obscene, threatening, abusive or hateful," or that offends "the privacy, publicity or other personal rights of others."[91] Nor may users of the network "post messages" on third-party blogs "that are excessive and/or intended to annoy or harass others"—"regardless of [the] policies" of the blogs on which the users post.[92] As in the Miami terms of service, the utility operating of the Chattanooga network also "reserves the right to reject or remove any material residing on or transmitted to or through" the network that violates the Acceptable Use Policy.[93] The Terms and Conditions for GOWEX, the private partner offering Internet access as part of the aforementioned New York City Wireless Corridor Challenge, "bars

---

90. *City of Miami Beach: WiFi Miami Beach—Network Terms and Conditions*, MIAMI BEACH, http://web.miamibeachfl.gov/wifi/scroll.aspx?id=53292 (last visited Oct. 15, 2014) (emphasis added); *see also* City of Raleigh, North Carolina, Downtown Raleigh Free WiFi Access Terms and Conditions (on file with author) ("Under no circumstances shall the City, its officers, employees, or agents be liable for any direct, indirect, incidental, special, punitive or consequential or other damages that arise or result in any way from use of, or inability to use, the service to or access to the Internet or any part thereof, or user's reliance on, or use of, information, services, or merchandise provided on or deletion of files, errors, defects, delays in operation, or transmission, or any defect in or failure of performance.").

91. *See Acceptable Use Policy*, ELECTRIC POWER BOARD CHATTANOOGA FIBER OPTICS, https://epbfi.com/support/legal/acceptable-use-policy/ (last visited Oct. 15, 2014).

92. *Id.*

93. *Id.*

the transmission of data . . . via Hotspots managed by GOWEX . . . whose content is threatening, derogatory, obscene, pornographic, or the transmission of any other type of material which constitutes or incites a conduct which may be considered a criminal offense, is prohibited."[94] GOWEX also "reserves the right to prevent or block access to any user" who violates the content policy.[95]

This Article has argued that speech carried over a public network, operated as either a municipally owned utility or via a partnership with a private ISP, is protected by the First Amendment, and a content-based interference with speech that is intended to be carried over such a network is a prior restraint. First Amendment doctrine also makes clear that outright bans on protected speech—even indecent speech, let alone "excessive," "derogatory," "abusive," or "hateful" speech—are never narrowly tailored enough to survive strict scrutiny.[96] If those three premises are correct, it seems clear that terms of service containing use proscriptions and waivers of the type used by Miami, Chattanooga, and perhaps scores of other municipalities, are impermissibly restricting carriage of a willing user's right to transmit protected speech over their networks.

As a general matter, "[g]ranting waivers to favored speakers (or . . . denying them to disfavored speakers) would of course be unconstitutional."[97] Similarly, a State's conditioning the receipt of a benefit on accepting a prior restraint on speech also offends the unconstitutional conditions doctrine. As Cass Sunstein has described the doctrine, "government may not coerce people into relinquishing constitutional rights through regulation, spending, and licensing, any more than it may do so through criminal sanctions."[98] In these cases, the relinquishment is of the First Amendment-derived right to nondiscriminatory government treatment of speech, and the coercion is the pre-requirement of waiver of the right to sue in exchange for

---

94. GOWEX Terms and Conditions for the New York City Wireless Corridor Challenge (on file with author).

95. *Id.*

96. Sable Commc'ns. of Cal., Inc. v. FCC, 492 U.S. 115, 126–28 (1989) (upholding ban on obscene telephone messages, but finding ban on indecent messages not narrowly tailored because indecent material generally receives full First Amendment protection).

97. Thomas v. Chi. Park Dist., 534 U.S. 316, 325 (2002).

98. *See* Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism (With Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 601 (1990); *see also* Perry v. Sindermann, 408 U.S. 593, 597 (1972) (statement of the doctrine); Frost Trucking Co. et al., v. R.R. Comm'n of State of Cal., 271 U.S. 583, 594 (1926) (statement of the doctrine); Armijo, *supra* note 35, at 466.

access to the network over which that speech will take place. Moreover, governments conditioning Internet access on the waiver of First Amendment rights cannot be heard to argue that prospective speakers can simply exercise those rights using the networks of private ISPs; the unconstitutional conditions doctrine is unconcerned with "alternative settings" for the speech of the parties the government seeks to coerce.[99]

Of course, the notion that one can waive at least some First Amendment rights in exchange for a government benefit without offending the Constitution is familiar in one particular context: public employment. There, the Supreme Court seems to have little trouble finding that the acceptance of the benefit validates the waiver. For example, in *Snepp v. United States*,[100] the Supreme Court upheld the use of secrecy agreements to regulate the speech of CIA employees. However, in that case the government did not seek waiver solely out of an interest in censorship; rather, the CIA had particular national security-related interests in preserving secrets to which current and former CIA employees had access.[101] By contrast, with respect to government-provided broadband, there is no non-censorship-related interest supporting the government's desire to secure a First Amendment waiver. In addition, the public employee cases take pains to distinguish the government's role as employer from the government's role as censor, a dichotomy not present in this context.[102]

Accordingly, any terms of use utilized by a municipality for governing access to its network, and in particular the network operator's ability to bar uses and users, must be limited to avoid this constitutional problem. Any waiver from suit in the State's terms of use should be circumscribed to those content-neutral, technically based disconnections associated with network management and maintenance. If a municipality does choose to limit certain content-based uses on its network, then those uses should be limited to the few categories of unprotected speech that the government may circumscribe because of its content, such as incitement, obscenity, false advertising, and copyright infringement. One such example, to

---

99. *See* Healy v. James, 408 U.S. 169, 180–83 (1972) (holding that a public university's decision to deny a student organization recognition burdened the group, even though the group could associate with prospective members in other ways); Autor v. Pritzker, 740 F.3d 176, 183 (D.C. Cir. 2014) (citing *Healy*).

100. Snepp v. United States, 444 U.S. 507 (1980).

101. *Id.* at 516.

102. *See*, *e.g.*, Connick v. Myers, 461 U.S. 138, 142–44 (1983).

end this Article where we began, is in the terms of service for the Harlem WiFi network. In those terms, Sky-Packets, the private ISP and network manager, informs prospective users that:

> [T]he Network is open to anyone, and individual activity and content on the network is not limited, screened, or monitored. This means that network users may access Internet sites that are harmful, graphic, or offensive. The network does not filter or block any sites. . . . Sky-Packets is not responsible for policing the Internet or for an Internet user's activity online [and] Sky-Packets upholds and affirms the right of adults to have access to constitutionally-protected materials and means of expression.[103]

CONCLUSION

As we have all learned over the past two years, the Internet has boosted the power and efficiency of the government's mass surveillance apparatus such that any presumptions concerning the privacy of online speech have been overwhelmed by the State's technological ability to monitor, amass, and crunch personal data. Based on what we now know of the surveillance state, the question of whether the government *can* collect information shared online is moot; the debate has already turned to setting the proper limits on its use of that information.[104]

In light of these sobering developments, one could easily conclude that the last thing we should be doing is enabling or encouraging governments to provide online networks for us to use for speech. We have seen what the State has shown itself capable of and willing to do in the surveillance context over *private* communications networks. Based on that experience, it would be naïve at best to think it would not bring those same attitudes to bear on monitoring and censoring speech over its *own* networks, where its efforts would be far more efficacious. In order to protect speech to the greatest degree possible, the most speech-protective position might be for the State to stay out of the speech carriage business altogether.

I am not so sure. Many governments have been unable to resist the temptation to censor speech by exercising control over information

---

103. Harlem Outdoor WiFi Network Terms of Use (eff. December 2013) (on file with author). The use of the term "adult" is not accidental; the Harlem WiFi Terms of Use also state that the network "is intended for use by persons 18 years or older, or with permission and supervision of a parent or guardian." *Id.*

104. *See* PRESIDENT'S REVIEW GRP. ON INTELLIGENCE & COMMC'NS TECHS., LIBERTY AND SECURITY IN A CHANGING WORLD (Dec. 12, 2013), http://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf.

communications technology. It is thus dangerous to assume that more digital speech will lead to a fuller marketplace of ideas, greater self-fulfillment, and more informed political choices. However, it also is difficult, as well as overly pessimistic, to conclude that technological change necessarily comes at the expense of free speech.

The First Amendment is not self-enforcing. Well-crafted network management principles can help ensure that speech carried via government-provided ICT is adequately protected, so long as those principles are (i) informed by traditional rules on content neutrality and prior restraint, but also (ii) mindful of both technology's particular capacity to repress expression ex ante and the State's innate impulse to monitor, censor, or otherwise control the dissemination of ideas. Critically, however, those rules should be in place before the wires are laid and antennas are raised. If we design and implement communications networks with the freedom of speech in mind, we can be more confident that these new digital speech spaces are actually the enablers of expression, galvanization, interactivity, and change that we believe them to be.