

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

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**INTRODUCTION**

On December 10, 2013, Mayor Michael Bloomberg of New York City announced the largest continuous free outdoor public WiFi network in the United States.<sup>2</sup> The network, covering most of the Harlem neighborhood, will extend 100 city blocks and reach nearly 80,000 residents, including 13,000 public housing

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<sup>2</sup> See NYC.gov, “Mayor Bloomberg Announces Country’s Largest Continuous Free Public WiFi Network (Dec. 10, 2013), at <http://www1.nyc.gov/office-of-the-mayor/news/394-13/mayor-bloomberg-country-s-largest-continuous-free-public-wifi-network/>.

occupants, as well as businesses in and visitors to the area. 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. In announcing the project, Mayor Bloomberg noted that the project would 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.”<sup>3</sup>

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. 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 percent of Americans in 2009 to 56 percent in 2012<sup>4</sup>—combined with municipalities’ focusing of their efforts on aggregating smaller service areas within their city limits.<sup>5</sup> 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 WiFi” networks built out and managed by cities such as

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<sup>3</sup> 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>.

<sup>4</sup> White House Office of Science and Technology Policy and National Economic Council, *Four Years of Broadband Growth* (June 2013), p. 7, [http://www.whitehouse.gov/sites/default/files/broadband\\_report\\_final.pdf](http://www.whitehouse.gov/sites/default/files/broadband_report_final.pdf) (citing Aaron Baar, *Tablets, Smartphones Driving CE Sales*, MARKET DAILY (July 2012), <http://www.mediapost.com/publications/article/179415/tablets-smartphones-driving-ce-sales.html#axzz2UeuoHIJv>).

<sup>5</sup> See, *e.g.*, *infra* note \_\_ (discussing, *inter alia*, efforts by Chicago, Cambridge, Kennesaw, Georgia, and Newton, North Carolina).

Chattanooga, Tennessee and Lafayette, Louisiana.<sup>6</sup> Another is the far more common public-private partnership such as Harlem WiFi, where a private ISP provides Internet access in a particular public space such as a neighborhood, business district, park, town hall, or transportation hub, in cooperation with a municipality or its administrative subsidiary, at low or no cost to the user.<sup>7</sup> As Mayor Bloomberg noted with respect to Harlem WiFi, all of these projects are undertaken for manifestly public purposes, from education to economic development. 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 federal 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.<sup>8</sup>

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<sup>6</sup> 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/>; Lafayette Utilities System Fiber, <http://lusfiber.com>.

<sup>7</sup> See, e.g., *infra* note \_\_ (discussing WiFi and cellphone service in New York subway system provided via partnerships between the Metropolitan Transit Authority and private carrier TransitWireless).

<sup>8</sup> FCC, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN 136 (2010). Connecting rural areas to the Internet has been a priority of the past three presidential administrations, albeit more through investment of federal funds than direct provision of service. See, e.g., Press Release, The White House, The Clinton-Gore Administration: A National Call to Action to Close the Digital Divide (Apr. 4, 2000), *available at* <http://clinton4.nara.gov/WH/New/html/20000404.html>; Press Release, President George W. Bush, Bush's Remarks on High Tech Improving Economy, Health Care, and Education (June 24, 2004), *available at* <http://georgewbush-whitehouse.archives.gov/news/releases/2004/06/20040624-7.html> (addressing the U.S. Department of Commerce and discussing his agenda for America's innovation, part of which includes ensuring

Advocates of fiber-to-the-home 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 operated networks.<sup>9</sup> For those who believe a subsidy approach has not succeeded in ensuring high-speed Internet access to all Americans, direct government provision of fiber-based Internet service seems the only solution.<sup>10</sup>

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,”

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“broadband technology is available in every corner of America by the year 2007.”). For example, the 2009 stimulus package granted over seven billion dollars to state and local governments and private providers for broadband projects in rural areas, as well as schools, libraries, public safety offices, and other municipal and community buildings. The legislation delegated authority over administration of the funds to the Rural Utilities Services program in the Department of Agriculture and the Commerce Department’s National Telecommunications and Information Administration. In this legislation, Congress also included a mandate to the FCC to develop a National Broadband Plan that “seek[s] to ensure that all people of the United States have access to broadband capability;” the FCC delivered the Plan to Congress in March 2010. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009) (codified at 47 U.S.C. § 1305 (2009)). In 2011, pursuant to the goals set out in the Plan, the FCC approved a process for transferring monies from its Universal Service Fund, traditionally designated for the expansion of telephone service into underserved areas, to a new Connect America Fund dedicated to expanding broadband deployment in those same areas. See 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](http://www.pcworld.com/article/242713/fcc_votes_to_end_telephone_subsidies_shift_to_broadband.html). That same year, the NTIA and the FCC launched the “National Broadband Map,” which details areas where broadband is available and identifies areas for future growth. See Anne Neville, *The National Broadband Map*, BROADBAND.GOV (Feb. 18, 2011), <http://blog.broadband.gov/?entryId=1278226>.

<sup>9</sup> 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/>); *Who Should Control Broadband?* GOVERNING MAGAZINE (April 2013), <http://www.governing.com/columns/eco-engines/col-public-or-private-sector-who-controls-broadband.html>.

<sup>10</sup> *Id.* (“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.”).

in a range of ways that are not yet apparent.<sup>11</sup> 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. Though the constitutional questions would seem to logically follow from that premise, we seem reluctant thus far to ask them.

Public forum doctrine would seem to offer one answer. 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 not traditional or designated public fora.<sup>12</sup> 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 proscription, which remains available for subsequent members of the public to communicate over.<sup>13</sup> The State, as owner of the servient estate, cannot then eject speakers from that space for content-based reasons. The presence or absence of

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<sup>11</sup> 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) (information communications technology “lowers the cost 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.”).

<sup>12</sup> See Enrique Armijo, *Kill Switches, Forum Doctrine, and the First Amendment’s Digital Future*, 32 CARDOZO ARTS & ENT. L.J. \_\_\_\_ (2014).

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

historical use of the space or similar spaces for speech, as manifested in traditional public forum doctrine, is thus dispositive. And 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.

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*,<sup>14</sup> *United States Postal Service v. Greenburgh Civic Associations*,<sup>15</sup> and *Denver Area Educational Television Consortium v. FCC*<sup>16</sup> 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

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<sup>14</sup> 539 U.S. 194 (2003).

<sup>15</sup> 453 U.S. 142 (1981).

<sup>16</sup> 518 U.S. 727, 740 (1996) (Breyer, J., plurality opinion); *see also 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 774 (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 779–81 (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.”).

by designation must be intended to serve both speakers and listeners.<sup>17</sup> Additionally, even if a State-provided communications network might be found to be a public forum, 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.<sup>18</sup> Since we 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.<sup>19</sup> If forum doctrine is anything, it is path-dependent. Hence, with forum doctrine off the table, we are thus left with the plain

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<sup>17</sup> 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.” Rather, the terminals were intended “to facilitate research, learning, and recreational pursuits” for *patrons*. 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. 539 U.S. at 206. 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 \_\_\_, at \_\_\_.

<sup>18</sup> As an example of this analysis, take 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 Letter from Bob Franklin, BART Bd. of Dirs., and Sherwood Wakeman, BART Interim Gen. Manager, to BART Customers (Aug. 20, 2011) (“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.”), <http://www.bart.gov/news/articles/2011/news20110820.aspx>.

<sup>19</sup> As the Court said in its primary case adopting the doctrine, the public form 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.”).

old First Amendment, and the question whether it applies to these spaces on its own terms.

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:

- 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?

The answers to these questions—and to forecast a bit, this Article’s answers to them are all “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 21st century speech spaces accordingly. And 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 at the altar of the new.

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

### **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.”<sup>20</sup> The role of “infrastructure provider” included not simply the local

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<sup>20</sup> Sharon E. Gillett *et al.*, *Local Government Broadband Initiatives*, White Paper for the MIT Program on Internet and Telecoms Convergence (Sept. 18, 2003), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2063217](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2063217). Gillett uses the term “user” broadly, to mean 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.

government’s “manage[ment of the] design, funding, and construction” of broadband access for its citizens, but also operation of the network.<sup>21</sup>

Gillett’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 under- 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.”<sup>22</sup> In the late 1990s, supermajorities of voters in smaller towns across the United States approved bonds for financing of public broadband networks in their communities that would be operated and administered like any other utility.<sup>23</sup> As John Blevins notes, “literally hundreds of cities” during that time “announced plans for various types of municipal broadband projects—most of them wireless networks.”<sup>24</sup> A primary selling point of these efforts was that they would assist in closing the “digital divides” in these communities by providing high-speed Internet access to citizens who may not have been able to

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<sup>21</sup> *Id.* at 5.

<sup>22</sup> Gillett, *supra* note \_\_\_, at 36.

<sup>23</sup> The majorities in these votes were often overwhelming:

[A]n Alta, Iowa referendum realized an eighty-eight percent voter approval rate. In Muscatine, Iowa, ninety-four percent of the voters sanctioned the bond issue. Similarly, in Spencer, Iowa, the incumbent cable company out-spent proponents 130-to-1, and voters nonetheless approved the project by a ninety-one percent majority. In Coldwater, Michigan, voters first rejected a proposal to issue general obligation bonds to finance a broadband network, but subsequently approved an issue of revenue bonds.

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) (internal citations omitted).

<sup>24</sup> John Blevins, *Death of the Revolution: The Legal War on Competitive Broadband Technologies*, 12 YALE J.L. & TECH. 85, 104 (2009).

afford it.<sup>25</sup> Local businesses would benefit as well, as the networks would help them reach potential customers and allow for flexible employee schedules.<sup>26</sup> Public wireless networks would also provide networked and efficient government service delivery for both citizens and civil servants, connecting everything from parking meters to police cars.<sup>27</sup> Larger communities that were better served by commercial providers, by contrast, 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.<sup>28</sup>

The functional split between large and small towns with respect to broadband access, however, has decreased in salience in the past ten years. Cities and counties of all sizes are now developing free WiFi networks at a rapid pace, both on their own and in collaboration with private operators.<sup>29</sup> Larger cities, even those that are arguably well-served by the private wireless market, are providing

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<sup>25</sup> *Id.* at 105 (citing Alexis Grant, *Houston WiFi to Benefit Lower-Income Residents: City’s WiFi Plan: Access for All*, HOUS. CHRON. (Feb. 25, 2007), <http://www.chron.com/business/technology/article/Houston-WiFi-to-benefit-lower-income-residents-1536453.php>).

<sup>26</sup> Eric M. Fraser, *The Failure of Public WiFi*, 14 J. TECH. L. & POL’Y 161, 163 (2009).

<sup>27</sup> *Id.*

<sup>28</sup> Gillett, *supra* note \_\_\_, at 2, \_\_\_.

<sup>29</sup> See, e.g., 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>; 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/>; Sharon E. Gillett, *Municipal Wireless Broadband: Hype or Harbinger?*, 79 S. CAL. L. REV. 561, 565–81 (2006).

their own broadband access points to the public, often by aggregating smaller service areas within their city limits.<sup>30</sup> 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.<sup>31</sup> Pursuant to these efforts, as of 2011, around 130 municipalities offered city-wide WiFi;<sup>32</sup> eighty-four cities had large outdoor WiFi hotspots, mostly in parks and downtown areas;<sup>33</sup> and another fifty-six had citywide or near-citywide coverage, but used it for government applications such as public safety.<sup>34</sup> Currently cities are

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<sup>30</sup> See, e.g., Cambridge Public Internet (CPI) WiFi Access Points, CAMBRIDGEMA.GOV, <http://www.cambridgema.gov/itd/CPI.aspx> (last visited Oct. 17, 2013). 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 CHICAGO BUSINESS (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>; City of Chicago Request for Information (RFI) for Broadband Infrastructure Expansion, *available at* <http://www.cityofchicago.org/content/dam/city/depts/dps/ContractAdministration/Specs/2012/Spec111304.pdf> (detailing intended coverage areas throughout Chicago); Press Release, Chicago Mayor Emanuel, 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*, KENNESAWWIFI.NET, <http://www.kennesawwifi.net/about> (last visited Oct. 17, 2013). 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. 17, 2013).

<sup>31</sup> John Cote, “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>; City of San Francisco: San Francisco Wi-Fi, <http://www6.sfgov.org/index.aspx?page=246>.

<sup>32</sup> 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 1 (Mar. 23, 2011)).

<sup>33</sup> 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*, MUNIWIRELESS.COM (June 9, 2011), <http://www.muniwireless.com/2011/06/09/att-launches-free-wifi-in-new-york-city-parks/>.

<sup>34</sup> Vos, *Updated List*, *supra* note \_\_\_\_.

exploring ways to add more WiFi and cellphone access for users of public transportation.<sup>35</sup>

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.<sup>36</sup> In other arrangements, private telecommunications providers donate hardware and/or service for publicly owned networks.<sup>37</sup> 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.<sup>38</sup> 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

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<sup>35</sup> See, e.g., 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](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). This would complement the service M.T.A. has already made available in many of its underground Manhattan stations through its agreement with Transit Wireless, the company behind this project. See Matt Flegenheimer, *Underground Cellphone Service Expands, But Some Call for Quiet*, N.Y. TIMES (Apr. 25, 2013), <http://www.nytimes.com/2013/04/26/nyregion/30-more-new-york-subway-stations-get-cellphone-service.html>.

<sup>36</sup> See Gillett *et al.*, *supra* note \_\_\_\_, at 11 (discussing aggregated municipal units as “anchor tenants” for commercial telecommunications services, and the benefits municipalities negotiate in exchange for such arrangements).

<sup>37</sup> This is also true with respect to publicly owned networks. See, e.g., Cote, *supra* note \_\_\_\_.

<sup>38</sup> See, e.g., *Microsoft and MetroFi Team Up on Free Wireless Internet in Portland, Ore.* (Nov. 14, 2006). However, the private ISP operating the ad-supported free wireless network on behalf of Portland went out of business. See Jaqueline Emigh, *In Portland, Oregon, Another City-wide Wi-Fi Network Bites the Dust*, Betanews.com (2009), <http://betanews.com/2008/02/22/in-portland-oregon-another-city-wide-wi-fi-network-bites-the-dust/>.

network.<sup>39</sup> 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.

It is certainly true 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 20 states from owning and operating their own broadband networks.<sup>40</sup> But 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.

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<sup>39</sup> Gillett *et al.*, *supra* note \_\_\_\_, at 18.

<sup>40</sup> See, e.g., Gillett, *supra* note \_\_\_\_, at 19-20; CRAWFORD, *supra* note \_\_\_\_, at 255–57 (detailing Time Warner’s successful efforts in the North Carolina legislature to pass a law banning municipal broadband service in that state, and noting that “18 other states have laws that make it extremely difficult or impossible for cities to provide this service to their citizens”); Jesse Drucker, *Wireless Warrior*, WALL ST. J., Feb. 13, 2006, at R.8, 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.”); 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). By one account, at least thirty-five states have considered such legislation. See Blevins, *supra* note 24, at 110 n.127 (citing FED. COMM’NS COMM’N, BRINGING BROADBAND TO RURAL AMERICA: REPORT ON A RURAL BROADBAND STRATEGY 53 n.308 (2009)).

## II. 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 the First Amendment compels nondiscriminatory treatment of those messages. But as discussed, it is not public forum doctrine that makes it so. Let us return to our most analogous government-provided communications network: the post office. For the reasons argued above, following *Greenburgh*, a court would not find that a system of message delivery such as a WiFi network is itself a public forum. But much like Internet access, the mail itself has long been understood to serve an important First Amendment value—the right to send and receive information.

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.”<sup>41</sup> The intended recipients of such mail were notified by the Postmaster and could request delivery. The named petitioner in *Lamont*, a pamphleteer who in 1963 received notice of the Post Office’s detention 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. In so doing, it quoted language from Justice Holmes that could as easily describe a citizen’s right to information over a State-provided communications network: “The United States may give up the post-office when it

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<sup>41</sup> 381 U.S. 301 (1965).

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 . . . .”<sup>42</sup> In his *Lamont* concurrence, Justice Brennan affirmed Lamont’s right to receive information using language similarly applicable to information and communications technology, or ICT,-enabled speech: “The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.”<sup>43</sup> By affirming the essentiality of the two-way nature of communication, the Court was tapping into principles recognized at least since Jefferson.<sup>44</sup>

In *Lamont*, the Court recognized the complementary nature of the State’s nondiscriminatory carriage obligations and the First Amendment.<sup>45</sup> Such treatment of State networks is also complementary of the “end-to-end,” or “e2e,” conception of the Internet, which calls for network operating protocols to treat all data equally—to “pass all packets”—as it moves along the network.<sup>46</sup> Technologists support the

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<sup>42</sup> United States *ex rel.* Milwaukee Soc. Democratic Pub. Co. v. Burleson, 255 U.S. 407, 437 (1921) (Holmes, J., dissenting).

<sup>43</sup> *Lamont*, 381 U.S. at 308 (Brennan, J., concurring). The term “ICT” “can refer to any technology serving the purpose of gathering, processing, and disseminating information, or supporting the process of communication”; the term is most often used “to signify digital ICTs, especially the use of the Internet and mobile phones.” DOROTHEA KLEINE, TECHNOLOGIES OF CHOICE?: ICTS, DEVELOPMENT, AND THE CAPABILITIES APPROACH 5 (2013).

<sup>44</sup> See Hannibal Travis, *The FCC’s New Theory of the First Amendment*, 51 SANTA CLARA L. REV. 417, 484 (2011) (“[F]ree correspondence between citizen and citizen’ is a ‘natural right’ . . . .”) (quoting Letter from Thomas Jefferson to Colonel James Monroe, *in* 9 THE WRITINGS OF THOMAS JEFFERSON 422 (Library ed. 1903)).

<sup>45</sup> *Lamont*, 381 U.S. at 306–07.

principle that the “intelligence” of a network, or more precisely the ability to identify, categorize, sort, and value passing information, should be located at the network’s edges, not along its route.<sup>47</sup> End-to-end as a design principle is credited by its advocates with nearly every Internet-related innovation we currently enjoy, from the rise of the application economy to the increase in our capacity for self-determination through networked interactions.<sup>48</sup> End-to-end also aligns with First Amendment values of information exchange and receipt—values that the State, as discussed, respects as a matter of course when providing access to speech spaces outside the ICT context. Accordingly, a State committed to end-to-end network design principles will give constitutional breathing space to the speech traffic carried over those networks.

Lodging *all* the intelligence of a network at its endpoints, however, can come at the expense of stability, in the form of viruses or other malware developed at one user end. Viruses can infect not only the network, which can be rendered powerless to stop such harms at the transmission level because of an over-commitment to end-to-end, but also users’ devices at other ends.<sup>49</sup> Of course, these infections interfere

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<sup>46</sup> See John G. Palfrey, Jr. & Robert Rogoyski, *The Move to the Middle: The Enduring Threat of “Harmful” Speech to the End-to-End Principle*, 21 WASH. U. J.L. & POL’Y 31, 32 (2006); see also BARBARA VAN SCHEWICK, *INTERNET ARCHITECTURE AND INNOVATION* 383–87 (2010); Nicholas P. Dickerson, *What Makes the Internet So Special? And Why, Where, How, and By Whom Should its Content be Regulated?*, 46 HOUS. L. REV. 61, 70 (2009).

<sup>47</sup> Palfrey & Rogoyski, *supra* note \_\_\_\_, at 32.

<sup>48</sup> See, e.g., VAN SCHEWICK, *supra* note \_\_\_\_, at 362–63; Mark A. Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV. 925, 928–29 (2001).

<sup>49</sup> See Jonathan L. Zittrain, *The Generative Internet*, 119 HARV. L. REV. 1974, 2030–31 (2006).

with other users’ speech over the network as well; we might call this a “hacker’s veto” problem. Accordingly, the State network operator should be free to make content-neutral technical management decisions that have the effect of keeping a network safe and operable. To return to our post office analogy, it does not necessarily implicate the First Amendment for the government to limit the mail system to letters and parcels.

*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 sketches out these obligations in more detail.

To use Thomas Nachbar’s helpful framework, State-run communications networks should be *user-neutral*, in that the network should provide continuous service to any user seeking to connect to it. The network should also be *use-neutral*, in that the network should generally not bar devices or applications of any type from being used on it, except for those that might credibly threaten network stability as discussed *supra*.<sup>50</sup> In the case of user-based discrimination, the first rule should be the same as that which currently governs in conventional public speech spaces: any punishment for disseminating or accessing illegal or otherwise unprotected speech over the State’s network should occur *ex post* rather than via preemptive denials of access, that is, by disconnection or denial of transmission prior to delivery. Granting the government the blanket authority to block or filter

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<sup>50</sup> Thomas B. Nachbar, *The Public Network*, 17 COMMLAW CONSPECTUS 67, 127–28 (2008).

even constitutionally unprotected content—such as obscene websites or copyright-infringing file transfers—would necessarily grant the corresponding authority to discern the content of the message the user is transmitting or the website the user is seeking to access, which would offend generally applicable nondiscrimination principles and chill First Amendment rights.<sup>51</sup>

To be sure, user-based discrimination by the State would seem to implicate the First Amendment more than use-based discrimination. Barring a user from speaking is a greater constitutional harm on its face than barring the method by which she chooses to speak, primarily because the latter restriction sounds more in content neutrality than a prior restraint. Blocking a particular instant messaging system or piece of social media software on a State ICT network is analogous to a

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<sup>51</sup> Consistent with our constitutional tradition, this proposed approach is naturally more permissive than those taken in other countries. *See, e.g.*, Robert Winnett, *WiFi Porn in Public Areas To Be Blocked*, TELEGRAPH (Apr. 23, 2013), <http://www.telegraph.co.uk/news/politics/10013914/WiFi-porn-in-public-areas-to-be-blocked.html>; Daniel Martin, *Porn Set to be Banned from Public Wi-Fi This Year to Protect Children*, DAILY MAIL (May 3, 2013), <http://www.dailymail.co.uk/news/article-2319149/Porn-set-banned-public-wi-fi-year-protect-children.html>. On the other hand, measures to prevent minors from obtaining access to obscene material on State networks might pass constitutional muster assuming those measures were narrowly tailored. For example, closely targeted filtering software applied at network access points where minors are likely to be accessing the network, such as parks, might pass this test. Under *American Library Association*, conditioning the receipt of federal funds on the adoption of such measures would also be constitutional. *See, e.g., Children and the Internet: Laws Relating to Filtering, Blocking, and Usage Policies in Schools and Libraries*, NAT'L CONF. OF STATE LEGISLATURES (Sept. 12, 2013), <http://www.ncsl.org/issues-research/telecom/state-internet-filtering-laws.aspx>. Of course, one might argue that if the government can express content preferences in its funding decisions, what difference might it make that the First Amendment compels user and use agnosticism in network management. My (admittedly unsatisfying) response is that it does not appear to this point that the Federal Government has made any content-conditional grants of funding to municipalities for public WiFi projects.

In addition, even in the United States, governments may make illegal the transmission of obscene content or other unprotected speech via State-provided communications channels and punish violators of those laws without offending the First Amendment. *See Roth v. United States*, 354 U.S. 476 (1957); *Ginzburg v. United States*, 383 U.S. 463 (1966). None of the arguments made here challenge that authority.

megaphone ban in a public park—in theory, the speaker remains free to use alternative means, in the form of other accessible applications such as email or other privately owned cellular networks where the speaker’s desired use would not be proscribed, to express her message.<sup>52</sup> But the availability of alternative means of communication carries no analytical force in the prior restraint context as compared to other areas of First Amendment doctrine—including forum analysis.<sup>53</sup> As the Supreme Court has held, “[e]ven if a privately owned forum [is] available” for a speaker who is barred from using State facilities, “that fact alone would not justify an otherwise impermissible prior restraint,” because “[o]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.”<sup>54</sup> If a use is barred because of the content that might be carried over it (which, as demonstrated, is as a practical matter often the case), alternative means availability cannot save the government’s blocking

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<sup>52</sup> *Kovacs v. Cooper*, 336 U.S. 77, 81 (1949). As in the network neutrality context, some network traffic, such as online streaming or large-file downloading, could theoretically be blocked or deprioritized for bandwidth management reasons, on the ground that such discrimination is, at least *prima facie*, not content-based. Consistent with a use-based nondiscrimination principle, however, such a regime should be based on bandwidth usage, not by barring the use of certain applications that are often dedicated to those uses. *Cf.* Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. ON TELECOMM. & HIGH TECH. L. 141, 168 (2003) (“[A] carrier concerned about bandwidth consumption would need to invest in policing bandwidth usage, not blocking individual applications.”).

<sup>53</sup> *See, e.g., City of Renton v. Playtime Theatres*, 475 U.S. 41, 46 (1986) (holding the government can impose content-neutral regulations that incidentally affect speech if, *inter alia*, alternative avenues of communication are left open).

<sup>54</sup> *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1975) (quoting *Schneider v. State*, 308 U.S. 147, 163 (1939)).

from constitutional scrutiny. Simply put, “[t]he fact that speech can occur elsewhere cannot justify a content-based restriction.”<sup>55</sup>

In addition, previous shutdowns and software-based restrictions demonstrate that the distinction between use-based and user-based discrimination in the ICT context is, in application, a highly permeable one. Bans on particular websites or email applications, for example, could be characterized as use-based or user-based.<sup>56</sup> Barring certain messages based on their content can be accomplished by blocking the mode of speech as well as the speaker. The efficiency with which States can bar speech *ex ante* via use-related interferences will prove too tempting to permit use-based discrimination.

There are important policy-based reasons for a use-nondiscrimination regime as well. Numerous scholars have argued that a network open to any and all applications promotes incentives for third parties to develop new software.<sup>57</sup> These innovations can have particular resonance in the present context, especially regarding applications designed to facilitate citizen-State interaction. As part of States’ adoption of open data principles, a burgeoning “hack the government” movement is emerging in the United States, United Kingdom, and elsewhere, as developers and designers use their formidable talents to merge existing government

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<sup>55</sup> *Denver Area Educ. Telecomm. Consortium v. Fed. Comm’n Comm’n*, 518 U.S. 727, 809 (1996) (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part) (citing *Conrad*, 420 U.S. at 556; *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 163 (1939)).

<sup>56</sup> See, e.g., *Turkey Seeks to Tighten Control Over Twitter*, BBC NEWS (June 27, 2013, 6:34 ET), <http://www.bbc.co.uk/news/technology-23079607>.

<sup>57</sup> VAN SCHEWICK, *supra* note \_\_\_\_, at 294–301.

data with new software applications for mobile devices.<sup>58</sup> These efforts have resulted in more efficient 311-related citizen reporting systems concerning maintenance requests, utility outages, traffic updates, and the like.<sup>59</sup> Use-based restrictions that bias newer applications might frustrate this development, inhibiting the use and improvement of e-government apps operating on State-provided networks, and disadvantaging citizens accessing the public Internet.

Two caveats, one for each discrimination principle set out above, are appropriate. Both involve treatment of the State’s technical network management decisions as time, place, and manner restrictions that have only an incidental burden on user speech. Prioritization of traffic, in which a service provider decides whether to favor the delivery of one user’s traffic over another, is a hotly contested topic in the debate over net neutrality.<sup>60</sup> On State-provided networks, however, prioritization for one particular type of user, namely priority for public safety communications traffic in the event of emergencies, seems noncontroversial. Since

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<sup>58</sup> See, e.g., Chantal Tode, *Federal Government Boosts Digital Strategy With Mobile Apps, Security Programs*, MOBILE MARKETER (May 29, 2013), <http://www.mobilemarketer.com/cms/news/content/15449.html>; *About*, REWIRED STATE, <http://rewiredstate.org/about> (last visited Oct. 6, 2013); see also *Apps for Communities*, CHALLENGEPOST, <http://appsforcommunities.challenge.gov/> (last visited Oct. 6, 2013); APPS FOR DEMOCRACY, <http://www.appsfordemocracy.org/> (last visited Oct. 6, 2013) (design contests for local government mobile apps); Lauren Katims Nadeau, *Citizen-to-Government Feedback at Heart of New Mobile App*, GOVTECH.COM (Nov. 8, 2010), <http://www.govtech.com/e-government/citizen-to-government-feedback-youtown-mobile-app.html>.

<sup>59</sup> See, e.g., Jeremy Mercker, *A Primer on Local Government Mobile Apps*, SOPHICITY (May 18, 2010), <http://sophicity.com/ResourcesArticles.aspx?CNID=532>.

<sup>60</sup> See, e.g., Christopher S. Yoo, *Network Neutrality and the Need for a Technological Turn in Internet Scholarship*, in ROUTLEDGE HANDBOOK OF MEDIA LAW 539 (Monroe E. Price, Stefaan G. Verhulst & Libby Morgan eds., 2013) (“Unfamiliarity with the Internet’s architecture has allowed some advocates to characterize prioritization of network traffic as an aberration, when in fact it is a central feature designed into the network since its inception.”).

such network management would usually be found content-neutral, the government’s ability to preempt citizen traffic for its own in those rare situations where the welfare of the public is at actual risk would cause little harm to the First Amendment.<sup>61</sup> However, governments should be mindful that prioritizing their own traffic would inevitably block the communications of other network users during crises—periods when those users would most need to communicate via ICT.<sup>62</sup> And as to use-based discrimination, the State, like any network provider, must be able to identify and block malicious applications or content intended to interfere with the network or users’ access to it. Again, the inquiry into whether the restriction is content-based or content-neutral, applied with appropriate scrutiny through judicial review of the State’s use-based discriminatory action, should offer sufficient breathing space for constitutional speech.<sup>63</sup> Giving the State the ability to manage its network without exposing itself to liability for every management decision will

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<sup>61</sup> See Alexander Reicher, *Redefining Net Neutrality After Comcast v. FCC*, 26 BERKLEY TECH. L.J. 733, 739-41 (2011).

<sup>62</sup> See Yoo, *supra* note \_\_\_, at 545–46. Though the network management decision there was content-based, the BART example is instructive here: users who would need to call family members or others to let them know the trains would be running late because of protests in the subway would be unable to do so, since BART had shut down its cell service repeaters to frustrate those same protests.

<sup>63</sup> In order for the First Amendment’s protections to have meaning, applicable nondiscrimination principles should also require transparency in any blocking decisions. In particular, the blocking government entity should provide notice to users that applications or content they seek to distribute or access over the State’s network have been blocked. *Cf.* DAWN C. NUNZIATO, VIRTUAL FREEDOM: NET NEUTRALITY AND FREE SPEECH IN THE INTERNET AGE 144–45 (2009) (arguing for a transparency requirement for private network providers). Without a transparency obligation, the “regulation behind the screen” problem will frustrate judicial review of alleged content-based interferences with speech over the network; *see also* NUNZIATO at 145 (without a transparency requirement, “it is quite difficult if not impossible for users to discern whether content or applications have been blocked”).

help ensure that governments, when considering the risks and benefits of providing ICT to their citizens, will not decline to offer ICT at all.

Federal commandeering of commercial, state, and local ICT networks presents a different issue, but one that can be resolved similarly. Again, the inquiry into whether an interference is content-based or content-neutral would supply the proper standard of review for analyzing the federal government’s interference with a networked speech space, whether that space was publicly or privately owned. So, for example, if a federal agency exercises emergency authority to choke or block network traffic because that traffic might be carrying the seeds of a cybersecurity attack, the action would likely be permissible, so long as the agency acts reasonably in its assessment of the threat and narrowly tailors the action taken to prevent it. But content-based interferences, even if taken in the name of public safety or analogous government interests, would be more rigorously reviewed as to motivation and means taken.

### **III. Public-private Internet access partnerships and state action**

Calling for an antidiscrimination rule for public Internet networks begs the more important, and perhaps more difficult, question of which networks should be deemed “public.” As noted above, Internet access offered by governments can take a range of forms, from the purely State-owned and -operated WiFi network or cell signal repeater service to the more common public-private partnerships that are arguably (at least by their operators’ lights) “public networks” in name only. Should

a network that is publicly accessible yet installed and run by a private company pursuant to an agreement with a municipality nevertheless be considered public virtual space? The state action doctrine answers that question affirmatively.

In the municipal WiFi context, when a public employee’s hand is at the kill switch, so to speak, the state action question is a simple one: any interference with speech over the network is by the State, and thus implicates the First Amendment.<sup>64</sup> The closer cases are those where the network servers and other necessary technology are privately owned and operated, even though the municipality offers nominal network access.<sup>65</sup> In such a circumstance, even though the private partner is the service-provider-in-fact, if there is a “close nexus between the State and the challenged action’ that seemingly private behavior ‘may be fairly treated as that of the State itself.’”<sup>66</sup> Facts that “bear on the fairness of such an attribution” include whether the private actor operates as a “willful participant in joint activity with the State or its agents.”<sup>67</sup>

Perhaps the most helpful example of such “joint activity” for present purposes is found in *Evans v. Newton*.<sup>68</sup> There, a city had transferred operational control over

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<sup>64</sup> *Cf.* *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11–15 (1978) (municipal utility a state actor and thus obliged to comply with Due Process Clause when terminating a citizen’s service).

<sup>65</sup> *See, e.g.*, How to Connect, City of New York Parks & Recreation, NYCPARKS, <http://www.nycgovparks.org/highlights/places-to-go/wi-fi/how-to-connect> (last visited Oct. 16, 2013) (listing AT&T, Cablevision, and Time Warner as companies who in addition to local partner organizations help provide public WiFi access to New York City parks).

<sup>66</sup> *Brentwood Acad. v. Tn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)).

<sup>67</sup> *Id.* at 296 (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982)).

<sup>68</sup> 382 U.S. 296 (1966).

a park to private trustees in order to avoid desegregating it, which would have been contrary to the “for whites only” terms of the testamentary trust establishing the park.<sup>69</sup> The Supreme Court found that the private trustees were state actors because the park served a primarily public purpose.<sup>70</sup> The fact that the park was *formerly* public undoubtedly played a role in the Court’s finding—prior to the transfer, the park was “swept, manicured, watered, patrolled, and maintained by the city,” and the “momentum it acquired as a public facility” was not “dissipated ipso facto by the appointment of ‘private’ trustees.”<sup>71</sup> However, even after the transfer, the “municipality remain[ed] entwined in the management [and] control of the park,” and “the nature of the service rendered the community by [the] park” was municipal in nature.<sup>72</sup> Similarly, in *Public Utilities Commission of the District of Columbia v. Pollak*, a private bus- and streetcar-operator whose “service and equipment [were] subject to regulation” by the District’s public utilities commission was deemed to be a state actor when it provided a radio broadcast system on its vehicles that was reviewed and approved by the commission.<sup>73</sup> And in *Lebron v. National Railroad Passenger Corp.*, the Court found that Amtrak was a state actor for First Amendment purposes when it denied access to its Penn Station billboards to a prospective advertiser seeking to lease the display space for his politically

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<sup>69</sup> *Id.* at 297.

<sup>70</sup> *Id.* at 301.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 490–91.

<sup>73</sup> 343 U.S. 451, 454, 462–63 (1952).

themed ad.<sup>74</sup> Though Amtrak was a state actor because it was created by federal statute and the government retained authority to appoint a majority of its directors, the fact that Amtrak was created “explicitly for the furtherance of federal governmental goals” was also relevant to the Court’s decision.<sup>75</sup>

The analysis in *Evans*, *Pollak*, and *Lebron* leads to the conclusion that a “public” WiFi network whose service is nonetheless supplied by a private partner should be treated as State-provided for First Amendment purposes. The “nature of the service rendered,”<sup>76</sup> to use *Evans*’s phrase, is quintessentially municipal—Internet access, provided in public places on a nondiscriminatory basis, at no cost and for no profit. Municipalities provide high-speed Internet access to meet public goals, such as economic development,<sup>77</sup> public safety, education,<sup>78</sup> and reducing the

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<sup>74</sup> 513 U.S. 374, 374 (1995).

<sup>75</sup> *Id.* at 397. It is certainly the case that many State-provided networks are creatures of statute, regardless of whether their operators-in-fact are private Internet service providers. *See, e.g.*, City of Salisbury, North Carolina, City Council Meeting of December 16, 2008, item adopting Fiber to the Home Capital Project Ordinance, meeting notes at pp. 8-9; City of Longmont, Colorado, Ordinance No. 14,48: Broadband Service Fees (adopted May 7, 2013); City of Lafayette, Louisiana, Ordinance No. O-230-2005 (issuing bonds for public utility’s high-speed Internet access service) (adopted Sept. 8, 2005) (all on file with author).

<sup>76</sup> 382 U.S. at 301.

<sup>77</sup> *See, e.g.*, City Council of Chattanooga, Tennessee, Res. No. 23446 (July 16, 2002), *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”); *see also* Brian Fung, *How Chattanooga Beat Google Fiber by Half a Decade*, WASH. POST (Sept. 17, 2013, 9:35 AM), <http://www.washingtonpost.com/blogs/the-switch/wp/2013/09/17/how-chattanooga-beat-google-fiber-by-half-a-decade/>.

<sup>78</sup> *See, e.g.*, An Act Relating to the Advancement of Cellular, Broadband, and Other Technology Infrastructure in Vermont, 2011 Vt. S. 78, No. 53, ¶ 16 (2012), *available at* <http://www.leg.state.vt.us/docs/2012/Acts/ACT053.pdf>.

cost citizens would otherwise pay to purely private carriers for broadband access.<sup>79</sup> Those cities enter partnerships with private entities to meet the same ends.<sup>80</sup> Public-private contracts for service delivery are of course insufficient by themselves to render the private counterparty a state actor.<sup>81</sup> But when the State receives benefits from the contract that extend well beyond the service delivery itself, as is unquestionably the case here, then the private party's actions should be attributable to the State.

Municipalities also play active roles in service delivery on an ongoing basis, even if they are not the service-provider-in-fact. They approve agreements with private entities to provide the service, and in many cases, they establish the terms and conditions of the service.<sup>82</sup> Moreover, a private partner's enforcement of a municipality's terms of service, including termination of a user's access for violation of those terms, demonstrates further "entwinement" between the two parties, such that the private partner and municipality have an "overlapping identity" and the

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<sup>79</sup> See, e.g., Fiber Optic System, tit. 8, ch. 9, § 8-9-1 (City Code of Ammon, Idaho Feb. 3, 2011), <http://www.ci.ammon.id.us/pdf/citycode/07012013AmmonCityCode.pdf> (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.").

<sup>80</sup> See, e.g., 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> (M.T.A. framing expansion of wireless and cellphone service on trains "as a safety issue").

<sup>81</sup> See *Dickerson v. Cal. Waste Solutions*, 2009 WL 2913452 (N.D. Cal., Sept. 8, 2009).

<sup>82</sup> See *infra* note \_\_\_\_ (discussing the City of Raleigh's Downtown Wi-Fi Terms of Service). Indeed, in some of these arrangements, the user's contractual counterparty is the State entity, not the private provider. See *id.*

private partner is a state actor for First Amendment purposes when managing the network on the State’s behalf.<sup>83</sup>

However, counterarguments to this conclusion are readily available. Per state action doctrine’s “public function” inquiry, the best argument against finding state action where a private Internet service company is a municipal WiFi system’s service-provider-in-fact is that citizen access to high-speed Internet service is not a function that has been “traditionally exclusively reserved to the State.”<sup>84</sup> But even under the public function test, state action doctrine looks “not to form, but to an underlying reality.”<sup>85</sup> Even if providing high-speed Internet access is not as “traditional” a government function as holding elections or exercising the power of eminent domain,<sup>86</sup> the State and its private partner in providing access are so entwined that the user’s reasonable expectation will usually be that the public network is being provided by the State, regardless of whether the State had traditionally provided the user a like service.

Furthermore, the traditional public function analysis carries real force as a limiting principle in state action questions. For example, assume that Gotham, a

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<sup>83</sup> See *Brentwood Acad. v. Tn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 300 (2001) (public entity and private partner “pervasively entwine[ed] to the point of largely overlapping identity”); see also *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 “exercise[s] such coercive power or provide[s] . . . significant encouragement, either overt or covert,” and that this test was met when a state trooper ordered a citizen to move his vehicle). As argued *supra*, one would be hard-pressed to find a better case of “largely overlapping identity” between a State and its private partner than a municipality offering a privately provided service in the municipality’s name. See *Brentwood*, 531 U.S. at 300.

<sup>84</sup> *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974).

<sup>85</sup> *Brentwood*, 531 U.S. at 301 n.4.

<sup>86</sup> *Flagg Bros. v. Brooks*, 436 U.S. 149, 156 (1978); *Metro. Edison Co.*, 419 U.S. at 353.

hypothetical American city, holds itself out as providing recycling collection services for its citizens. Assume further that despite this holding-out, the service is in fact provided, pursuant to contract, not by Gotham’s sanitation department, but by a private-partner company that owns the trucks that drive the recycling route along the streets of Gotham and collect the recyclables left by the residents that live on that route. If the private partner opted not to collect recycling in a certain Gotham neighborhood because of the race of the residents in that neighborhood, it would seem the Fourteenth Amendment would be implicated by the denial of service, even though the actor-in-fact was a private one.<sup>87</sup> In such a case, the relationship between Gotham and the private party goes well beyond “detailed regulation of and substantial funding for [the] private actor[.]”<sup>88</sup> The fact of Gotham’s holding itself out as service provider is sufficient entwinement that the “action of [the private partner] may be fairly treated as that of the State itself.”<sup>89</sup> On the other hand, a court might just as well find that, as noted above, the service is not one traditionally provided exclusively by the State.<sup>90</sup>

The racist recycling company analogy is not completely persuasive for another reason as well. As Rodney Smolla and Melville Nimmer have pointed out,

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<sup>87</sup> *Cf. West v. Atkins*, 487 U.S. 42 (1988) (a medical doctor, “as a physician employed by the State of North Carolina to provide medical services to state prison inmates,” acted under color of state law when providing medical services to inmate and was therefore a state actor).

<sup>88</sup> *Blum v. Yaretsky*, 457 U.S. 991, 1011 (1982).

<sup>89</sup> *Metro. Edison Co.*, 419 U.S. at 351.

<sup>90</sup> *See id.*, 419 U.S. at 351 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).

the state action doctrine is viewed more expansively in the Equal Protection context than in the speech context.<sup>91</sup> But 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” was adopted in a First Amendment case—*Marsh v. Alabama*.<sup>92</sup> To be sure, *Marsh* itself has been construed narrowly.<sup>93</sup> However, its core holding—that when a private party stands in the shoes of the State, the Constitution applies to the party’s conduct—remains salient.

By definition, parties in a joint venture share liabilities.<sup>94</sup> A public-private joint venture should be no different simply because some of those liabilities are imposed by the Constitution. Finding that a State may avoid First Amendment-derived limitations on its activity by delegating control over a public network to a private entity would favor an overly formalistic approach to state action problems, which the Supreme Court has expressly rejected.<sup>95</sup> This is particularly so when the State is simultaneously enjoying the public benefits of that partnership by being associated with free and ubiquitous Internet access provided under the State’s name.

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<sup>91</sup> SMOLLA & NIMMER ON FREEDOM OF SPEECH § 16:26.

<sup>92</sup> 326 U.S. 501 (1946).

<sup>93</sup> *See, e.g.*, *Cable Investments, Inc. v. Woolley*, 867 F.2d 151, 162 (3d Cir. 1989).

<sup>94</sup> *See, e.g.*, *Cosy Goose Hellas v. Cosy Goose USA, Ltd.*, 581 F. Supp. 2d. 606, 623 (S.D.N.Y. 2008).

<sup>95</sup> *Metro. Edison Co.*, 419 U.S. at 352.

#### IV. Terms of service as speech rules and the unconstitutional conditions doctrine

Thorny issues arise when constitutional law and contract law interact. Like any ISP, municipalities or their joint venture partners place terms-of-use-based obligations on users as a condition of access to their networks; these terms nearly always include a user waiver of potential liability for any disconnection or other denials of access. The city of Miami’s terms of use for its Miami Beach WiFi network, for example, contain a blanket waiver for a service interference of any sort:

[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.<sup>96</sup>

Similarly, 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 “the privacy, publicity or other personal rights of

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<sup>96</sup> *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. 6, 2013); 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.”).

others.”<sup>97</sup> 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.<sup>98</sup> As in the Miami terms of service, the utility operating 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.<sup>99</sup>

Demanding that a user waive the right to sue the government in the event of a content or viewpoint-based disconnection or other reduction in service implicates the unconstitutional conditions doctrine, under which the State may not condition receipt of a benefit on the waiver of a constitutionally protected right—“even if the government has no obligation to offer the benefit in the first instance.”<sup>100</sup> In other words, if the State must carry the traffic of any willing user on its network as a First Amendment matter subject to certain content-neutral exceptions, it cannot then require prospective users to waive that right as a condition of carriage. The unconstitutional conditions doctrine “prevents the government from asking the individual to surrender by agreement rights that the government could not take by direct action.”<sup>101</sup>

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<sup>97</sup> See Electric Power Board of Chattanooga Fiber Optic Acceptable Use Policy, *at* <https://epbf.com/support/legal/acceptable-use-policy/>.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Frost & Frost Trucking Co. v. Railroad Comm’n of State of Cal.*, 271 U.S. 583, 594 (1926).

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 in finding that the acceptance of the benefit validates the waiver; for example, in *Snepp v. United States*,<sup>102</sup> the Supreme Court upheld the use of secrecy agreements to regulate the speech of CIA employees. But 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. Here, by contrast, 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.<sup>103</sup>

By demanding waiver of suit for any disconnection as a prerequisite of speech, these terms of service provisions condition a government benefit “upon

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<sup>101</sup> Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 7 (1988). Again, it is not a response to claim that no violation has occurred because the blocked user is free to speak via a different privately owned network, because alternative means availability does not cure the imposition of a prior restraint, and blocking a speaker’s message before it reaches its intended audience, even if achieved through technological means, is a prior restraint. This rule also distinguishes the set of facts discussed here from the government-subsidized speech cases, which generally hold that conditioning receipt of government funds on viewpoint-based limitations on the use of those funds are constitutionally permissible because the speaker is free to circumvent the limitation by abstaining from using the conditioned funds to speak. *See, e.g.*, *Rust v. Sullivan*, 500 U.S. 173 (1991); *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998).

<sup>102</sup> 444 U.S. 507 (1980).

<sup>103</sup> *See, e.g.*, *Connick v. Meyers*, 461 U.S. 138, 142-44 (1983).

acceptance of prior restraint.”<sup>104</sup> The better, and constitutionally wiser, course would be for any waiver from suit in the State’s terms of use to be limited to (1) those content-neutral, nondiscriminatory disconnections associated with network management and maintenance that this Article deems are presumptively permissible, and (2) those narrow categories of unprotected speech that the government is able to interfere with because of its content, such as incitement, obscenity, and the like.

Finally, the consistent use of terms of service in the digital speech space also provides an argument against applying forum doctrine to that space. Forum doctrine’s “general access” principle provides that if a citizen must “obtain permission” from the government to use State property for speech, then that property has not been designated a public forum,<sup>105</sup> in contrast to property the government grants speakers access to “as a matter of course.”<sup>106</sup> To the extent that the government grants permission to use its network in return for the user agreeing to its terms and conditions for use—a straightforward conclusion, given the terms used in those agreements<sup>107</sup>—the State’s case that it has not designated a public form by providing an ICT-enabled network is an easy one to make. As Justice

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<sup>104</sup> Epstein, *supra* note \_\_\_, at 7.

<sup>105</sup> *Cornelius v. NAACP*, 473 U.S. 788, 804 (1985).

<sup>106</sup> *Entm’t Software Ass’n v. Chi. Transit Auth.*, 696 F. Supp. 2d 934, 943 (N.D. Ill. 2010).

<sup>107</sup> In other words, the State argues that agreement to the terms of use is consideration in exchange for permission to access its network, and therefore access is granted selectively and not generally. See Robert A. Hillman & Maureen A. O’Rourke, *Rethinking Consideration in the Electronic Age*, 61 HASTINGS L.J. 311, 328 (2009) (“Terms of use . . . constitute consideration under general contract law if at least part of the vendor’s motive (however insubstantial), judged objectively, is to extract agreement to the terms of use.”); Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 466 (2006) (“[T]he user has ‘signed’ the contract by clicking ‘I agree’ . . .”).

Blackmun predicted, once the State denies a prospective user access, the public forum question has been conclusively decided in the government's favor.<sup>108</sup> Here again, application of forum doctrine would lead to underprotection of digital speech.

## CONCLUSION

As we have all learned over the past year-and-a-half, 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.<sup>109</sup>

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 speak over. Based on what the State has shown itself capable of and willing to do in the surveillance context over *private* communications networks, 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

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<sup>108</sup> *Cornelius v. NAACP*, 473 U.S. 788, 825 (1985) (Blackmun, J., dissenting) (“if the exclusion of some speakers is evidence” that the government did not intend to designate its property a public forum, “no speaker challenging that denial of access will ever be able to prove” that the property was a public forum at all).

<sup>109</sup> See *Liberty and Security in a Changing World: Report and Recommendations of The President's Review Group on Intelligence and Communications Technologies* (rel. Dec. 12, 2013), [http://www.whitehouse.gov/sites/default/files/docs/2013-12-12\\_rg\\_final\\_report.pdf](http://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf).

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 ICT. 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. But 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 informed by traditional rules on content neutrality and prior restraint, but also 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 they are, 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.