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The Internet is the New Marketplace of Ideas: Why Riley v. California Supports Net Neutrality

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THE INTERNET IS THE NEW MARKETPLACE OF IDEAS: WHY *RILEY V. CALIFORNIA* SUPPORTS NET NEUTRALITY

Adam Lamparello*

Net neutrality "is absolutely the First Amendment issue of our time."[1]

I. INTRODUCTION

The Supreme Court's decision in *Riley v. California*, which held that law enforcement officers may not search the content of an arrestee's cell phone without a warrant, supports a First Amendment-based internet neutrality doctrine.[2] Although *Riley* was a Fourth Amendment case, the Court's reasoning reflects a fundamental truth: the world has changed, and to protect basic civil liberties, the law must change as well.

The Internet is the digital age equivalent of traditional public and limited purpose public forums, such as public sidewalks and town halls, just as cellular telephones are the equivalent of a private home.[3] It enables the free flow of information between networks, including speech on matters of political, social, and commercial importance. When internet service providers (ISPs) manipulate the flow of this information based on a user's identity or message, such as by charging excessive fees or "traffic shaping," a technique that limits available bandwidth and results in "slowing down some forms of traffic, like file-sharing, while giv-

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[1] *See* Julian Hattem, *Al Franken: Net Neutrality is 'First Amendment Issue of Our Time,'* THE HILL (Jul 8, 2014), http://thehill.com/policy/technology/211607-franken-net-neutrality-is-first-amendment-issue-of-our-time

[2] Riley v. California, 134 S.Ct. 2473 (2014).

[3] *See, e.g.,* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) ("A traditional public forum is property that by long tradition or by government that have been devoted to assembly and debate").

ing others priority,"[4] they engage in content-based discrimination.[5] Thus, just as the First Amendment prohibits the government from regulating speech in public and limited public forums on the basis of its content, it should also prohibit ISP and website operators from doing the same on the Internet. Such conduct is akin to allowing the Boy Scouts to march in the public square, while relegating flag burners to desolated areas, remote deserts or dark alleys.[6] These practices thwart the free flow of information, stifle competition, and hinder open public debate on matters of political, social, and commercial importance.[7]

In addition, websites permitting users to comment on political and social issues,[8] such as The National Review Online or the Huffington Post, hold themselves out as a limited purpose forum for debate on matters of public concern.[9] Consequently, if such websites filter or remove non-offensive comments, or restrict ac-

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[4] Christopher R. Steffe, *Why We Need Net Neutrality Now Or: How I Learned to Stop Worrying and Start Trusting the FCC,* 58 DRAKE L. REV. 1149, 1158 (2010).

[5] *See, e.g.,* Joseph Blocher, *Viewpoint Neutrality and Government Speech,* 52 B.C. L. REV. 695, 703 (2011) ("even speech which might otherwise be flatly prohibited--in other words, speech that falls outside the reach of the First Amendment--may not be treated differently on the basis of the viewpoint it expresses"); Janet Elizabeth Haws, *Architecture As Art? Not in My NeoColonial Neighborhood: A Case for Providing First Amendment Protection to Expressive Residential Architecture,* 2005 B.Y.U. L. REV. 1625, 1659, fn. 164 (2005) (*quoting* Chi. Police Dep't v. Mosley, 408 U.S. 92, 95 (1972)). ("the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content"); Frisby *v. Schultz,* 487 U.S. 474 (1988) ("[t]he government may not regulate use based on hostility—or favoritism—towards the underlying message expressed").

[6] *See* Texas v. Johnson, 491 U.S. 397 (1989) (invalidating a statute prohibiting desecration of the American flag).

[7] Steffe, *supra* note 4, at 1144-45,

[8] *See, e.g.,* Snyder v. Phelps, 131 S.Ct. 1207, 1216 (2014) (matters of public concern are those "fairly considered as relating to any matter of political, social, or other concern to the community," or when it "is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.") (*quoting* Connick v. Myers, 461 U.S. 138, 144 (1983)); San Diego v. Roe, 543 U.S. 77, 83-84 (2004)).

[9] *See,* Blocher, *supra* note 3, at 703 (A limited purpose public forum consists of "public property which the state has opened for use by the public as a place for expressive activity").

cess, based on a mere disagreement with the user's message, they engage in viewpoint discrimination.[10] Because these practices threaten to undermine free speech protections, the First Amendment should apply to online public and limited purpose forums through a net neutrality doctrine. Simply put, infringements on civil liberties that would never be allowed in the physical world should not be permitted in the virtual world. [11]

When ISPs discriminate against Internet speech based on that speech's content, they are doing precisely what the First Amendment forbids. In doing so, ISPs are engaging in conduct that would never be allowed if it were to occur in a public park or town hall meeting. The American Civil Liberties Union has recognized the dangers present in a world without net neutrality:

> Without the principle of network neutrality, "network providers are free to discriminate." Companies that offer the portals to connect to the Internet "are not considered 'state actors' that trigger free speech protections under the First Amendment. . . . [T]hey can effectively shut down the 21st century marketplace of ideas by screening Internet e-mail traffic, blocking what they deem to be undesirable content, or pricing users out of the marketplace."[12]

Permitting ISPs to restrict access or disrupt the free flow of data is like facing a soda machine and having only three choices: coke, diet coke, and cherry coke. Thus, absent a compelling justification that is narrowly tailored to achieve a legitimate goal, ISPs should be prohibited from undermining a user's First Amendment freedoms.[13]

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[10] *Id.*

[11] *See, e.g.,* Steffe, *supra* note 4, at 1154-55.

[12] *See id.* at 1160 (*quoting Internet Freedom and Innovation at Risk: Why Congress Must Restore Strong Net Neutrality Protection*, ACLU (Sept. 22, 2006) *available at* http:// www.aclu.org/freespeech/internet/26829res20060922.html.)

[13] *See, e.g.,* Richard H. Fallon, Jr., *Strict Judicial Scrutiny,* 54 UCLA L. REV. 1267, 1315-16 (2007) (discussing strict scrutiny and stating that "there are three

Of course, ISPs (and website operators) are private entities, but when they have substantial control over a medium "used for purposes of assembly, communication of thoughts between citizens, and discussing public questions,"[14] they have the power to impact users' free speech rights.[15] This is not to say that ISPs and website operators cannot prohibit obscenity,[16] fighting words,[17] and defamation,[18] and, in some cases regulate the time, place, and manner of speech that may offend particular users.[19] They cannot,

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crucial steps in applying the formula: (1) identifying the preferred or fundamental rights the infringement of which triggers strict scrutiny; (2) determining which governmental interests count as compelling; and (3) giving content to the requirement of narrow tailoring").

[14] United States v. Am. Library Ass'n. 539 U.S. 194, 215 (2003) (holding that Congress may require public schools and libraries to install web filtering software as a condition of receiving federal funding).

[15] *See, e.g., U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000) (invalidating section 505 of the Telecommunications Act of 1996, which requires cable operators to block or scramble adult programming from 6 a.m. to 10 p.m.).

[16] *See, e.g.,* Miller v. California, 413 U.S. 15, 24 (1973). The *Miller* Court defined obscenity as follows:

> The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest ... (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. *Id.*

[17] *See, e.g.,* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1992) (defining fighting words as "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace").

[18] *See, e.g.,* Milkovich v. Lorain Journal Co., 497 U.S. 1, 8-9 (1990) (to be defamatory, speech must be: (1) published to a third party, (2) false; (3) injure one's reputation; and (4) cause damages).

[19] *See* Note, Margaret L. Mettler, *Graffiti Museum: A First Amendment Argument for Protecting Uncommissioned Art on Private Property,* 111 MICH. L. REV. 249, 266-67 (2012). The time, place, and manner standard requires that speech regulations be content neutral:

however, block or slow traffic to suppress unpopular speech, or restrict access because of a disagreement with the message—or messenger. After all, the very purpose of the First Amendment is to promote the "free and robust debate of public issues,"[20] an "uninhibited marketplace of ideas," [21] and the "advancement of knowledge and the search for truth."[22] The Internet *is* the new marketplace of ideas.

Accordingly, the First Amendment should protect against infringements on internet speech in the same manner that the

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> As long as ordinances are content neutral, they may limit the time, place, and manner of speech are justified without reference to the content of the regulated speech" ... "serve a significant governmental interest" ... are "narrowly tailored to serve [that] interest," and "leave open ample alternative channels for communication of the information. *Id.* (*quoting* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

[20] R.A.V. v. City of St. Paul, 505 U.S. 377, 386 (1996).

[21] McCullen v. Coakley, 134 S.Ct. 2518, 2529 (2014) (*quoting* FCC v. League of Women Voters of Cal., 468 U.S. 364, 377 (1984)).

[22] W. Robert Gray, *Public and Private Speech: Toward a Practice of Pluralistic Convergence in Free Speech Values,* 1 TEX. WESLEYAN L. REV. 1, 8 (1994); *see also* Ann Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in Citizens United,* 61 CASE W. RES. L. REV. 497, 510 (2010). The Court has relied on principles of democracy when upholding the First Amendment rights of corporations:

> [T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decision making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual. *Id.* (*quoting* First National Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978)).

Fourth Amendment applied in *Riley* to protect arrestees from warrantless searches of their cell phones. Just as a cell phone is analogous to a private residence,[23] in that it stores a substantial amount of personal papers and effects,[24] the Internet is analogous to a public sidewalk and town hall where users express political, social, and commercial speech. [25] And just as the Fourth Amendment's reasonableness requirement[26] prevents law enforcement from "rummag[ing] at will among a person's private effects,"[27] the First Amendment's prohibition on "regulat[ing] use based on hostility—or favoritism—towards the underlying message expressed,"[28] prevents ISPs and some website operators from engaging in content and viewpoint-based discrimination.[29]

As the *Riley* Court recognized, we live in a new world, where technological advances have transformed how, where, and when we think about basic freedoms. One aspect of that transfor-

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[23] Riley v. California, 134 S.Ct. at 2491.

[24] *Id.* at 2493.

[25] *See, e.g.,* Widmar v. Vincent, 454 U.S. 263, 277 (1981) (holding that schools that create open forums for use by student groups may not discriminate against particular groups based on content or viewpoint).

[26] *See,* U.S. CONST., AMEND. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized").

[27] Riley v. California, 134 S.Ct. at 2492 (*quoting* Arizona v. Gant, 556 U.S. 332, 345 (2009)).

[28] R.A.V., 505 U.S. at 386; *see also* Carey v. Brown, 447 U.S. 455 (1980) (invalidating a ban on residential picketing that exempted labor picketing) (brackets added).

[29] *See,* Steffe, *supra* note 4, at 1155. Although net neutrality is defined in various ways, a common focus is on prohibiting the free flow of information:

> Modern-day network neutrality seeks to maintain the Internet's original "dumb," end-to-end architectural principle by prohibiting common carriers--ISPs--from interfering with the transmission of packets over their networks, whether by artificially slowing down or blocking those packets, or by any other means that selectively inhibits the natural flow of packets over their network. *Id.*

mation is to recognize that civil liberties transcend physical space. They extend to devices, such as cell phones and laptop computers, where citizens store the type of information that would have been found in a person's home fifty years ago. Thus, in the same way that cellular telephones are no longer phones in the traditional sense, the Internet is not simply a forum where citizens purchase goods and services. Accordingly, the Court should embrace a new neutrality doctrine. Part II discusses the *Riley* decision, particularly the Court's emphasis on protecting privacy rights in digital devices. Part III argues that *Riley's* rationale applies by analogy to Internet speech.

II. RILEY V. CALIFORNIA: A NEW JURISPRUDENCE FOR THE DIGITAL AGE

Riley is the beginning of a new jurisprudence that applies time-honored constitutional principles to twenty-first century forums where fundamental civil liberties are exercised and must be protected. In *Riley*, the Court unanimously held that law enforcement officers could not search the contents of an arrestee's cell phone without a warrant.[30] The Court rejected the Government's argument, based on *Chimel v. California,*[31] which determined that warrantless searches of an arrestee's cell phone were permissible to protect officer safety and preserve evidence.[32] In addition, the

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[30] Riley v. California, 134 S.Ct. at 2495.

[31] Chimel v. California, 395 U.S. 752 (1969).

[32] *Id.* at 762-763. In *Chimel,* the Court created the search incident to arrest exception to allow limited search of an arrestee to protect officer safety and prevent the destruction of evidence.

> When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or

Court distinguished its prior holding in *Smith v. Maryland,*[33] which upheld law enforcement's use of a pen register to monitor a suspect's outgoing phone calls from a private residence.[34]

The *Riley* Court relied on three justifications to differentiate cell phones from plastic containers, cigarette packs, or pen registers: (1) storage capacity, (2) the quality of information stored on cell phones, and (3) the pervasive use of cell phones in modern society.[35] Unlike the telephone at issue in *Smith,* a cell phone stores vast quantities of personal information and thus implicates unique privacy concerns.[36] For example, most smart phones can store sixteen gigabytes of information, which "translates to millions of pages of text, thousands of pictures, or hundreds of videos."[37] In fact, "[e]ven the most basic phones that sell for less than $20 might hold photographs, picture messages, text messages, Internet

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> evidentiary items must, of course, be governed by a like rule. *Id.*

[33] Smith v. Maryland, 442 U.S. 735 (1979).

[34] *Id.* at 744. In *Smith,* the Court relied largely on the fact that Petitioner had no reasonable expectation of privacy in outgoing telephone calls:

> Petitioner voluntarily conveyed numerical information to the telephone company and "exposed" that information to its equipment in the ordinary course of business. In so doing, petitioner assumed the risk that the company would reveal to police the numbers he dialed. The switching equipment that processed those numbers is merely the modern counterpart of the operator who, in an earlier day, personally completed calls for the subscriber. *Id.*

[35] *See* United States v. Robinson, 414 U.S. 218, 236 (1973) (upholding the search of a crumpled cigarette pack found on the arrestee's person that yielded fourteen grams of heroin); New York v. Belton, 453 U.S. 454, 460, n. 4 (1981) (upholding the search of a container, which the Court defined as an "object capable of holding another object").

[36] Riley v. California, 134 S.Ct. at 2489 ("Cell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person").

[37] *Id.*

browsing history, a calendar, a thousand-entry phone book, and so on."[38]

Second, the type of information contained in cell phones resembles the private papers and effects traditionally protected under the Fourth Amendment.[39] Moreover, "[a] phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form... ."[40] In fact, cell phones can hold "in one place many distinct types of information—an address, a note, a prescription, a bank statement, a video—that reveal much more in combination than any isolated record."[41]Writing for the majority, Chief Justice Roberts explained how pre-digital era cases would not protect this information from unwarranted searches:

> The fact that a search in the pre-digital era could have turned up a photograph or two in a wallet does not justify a search of thousands of photos in a digital gallery. The fact that someone could have tucked a paper bank statement in a pocket does not justify a search of every bank statement from the last five years. And to make matters worse, such an analogue test would allow law enforcement to search a range of items contained on a phone, even though people would be unlikely to carry such a variety of information in physical form.[42]

Simply put, warrantless cell phone searches would give "police officers unbridled discretion to rummage at will among a person's private effects."[43]

Third, cell phone use is pervasive in modern society, and places "vast quantities of personal information literally in the

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[38] *Id.*
[39] *Id.*
[40] Riley v. California, 134 S.Ct. at 2490.
[41] *Id.* at 2489.
[42] *Id.* at 2492.
[43] *Id.* at 2491.

hands of individuals."[44] Indeed, it is "the person who is not carrying a cell phone, with all that it contains, who is the exception."[45] In fact, "it is no exaggeration to say that many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate."[46] Moreover, it did not matter that, "[p]rior to the digital age, people did not typically carry a cache of sensitive personal information with them as they went about their day,"[47] did not "make the information any less worthy of the protection for which the Founders fought."[48] And searches of cell phones bore "little resemblance to the type of brief physical search"[49] that the Court confronted in other cases. Thus, absent exigent circumstances, law enforcement must have probable cause and procure a warrant before searching an arrestee's cell phone.[50]

The Court's decision in *Riley* stands for two fundamental propositions. First, pre-digital era case law addressing warrantless searches in the context of physical objects does not apply to modern technological devices. The *Riley* Court recognized that applying pre-digital era precedent to cell phones would unmoor the search incident to arrest doctrine from its original justifications and result in searches that infringed on privacy protections.[51]

In fact, detachment from the search incident to arrest doctrine's original justifications allowing for infringement on constitutional privacy protections had already occurred in other contexts. In the years following *Chimel*, searches incident to arrest steadily

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[44] *Id.* at 2485.

[45] Riley v. California, 134 S. Ct. at 2490 ("According to one poll, nearly three-quarters of smart phone users report being within five feet of their phones most of the time, with 12% admitting that they even use their phones in the shower").

[46] *Id.*

[47] *Id.* ("Allowing the police to scrutinize such records on a routine basis is quite different from allowing them to search a personal item or two in the occasional case").

[48] *Id.* at 2495.

[49] *Id.* at 2485.

[50] Riley v. California, 134 S. Ct. at 2495. ("Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant").

[51] *Id.* at 2482 ("the ultimate touchstone of the Fourth Amendment is reasonableness") (*quoting* Brigham City v. Stuart, 547 U.S. 398, 403 (2006)).

expanded in scope and their expansion often had little, if anything, to do with protecting officer safety or preserving evidence. For example, in *United States v. Robinson,*[52] the Supreme Court upheld a warrantless pat down search of an arrestee that resulted in the discovery of a crumpled cigarette package, and consequently extended *Chimel* by permitting searches of the arrestee's person *and* "separate search[es] of effects found on his person."[53]

In *New York v. Belton,*[54] the Court upheld the search of a jacket found in the passenger compartment of an arrestee's vehicle, even though the arrestee was already in police custody and could not reach for or access the jacket. Noting the jacket was located "inside the passenger compartment of the car in which the respondent had been a passenger just *before* he was arrested,"[55] the Supreme Court nonetheless held that the jacket was "within the arrestee's immediate control"[56] within the meaning of *Chimel.* Justice Brennan dissented and categorized the decision as "a dangerous precedent that is not justified by the concerns underlying *Chimel*"[57] and "inconsistent with every significant search-incident-to-arrest case."[58]

In *Thornton v. United States,*[59] the Supreme Court expanded *Belton* and *Chimel* further by permitting warrantless searches of

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[52] United States v. Robinson, 414 U.S. 218 (1973).

[53] *Id.* at 255 (Marshall, J., dissenting) (brackets added). The search yielded fourteen grams of heroin. *Id.* at 220.

[54] New York v. Belton, 453 U.S. 454 (1981).

[55] *Id.* at 462-463 (emphasis added).

[56] *Id.* at 462.

[57] *But see* United States v. Chadwick, 433 U.S. 1, 15 (1977) (invalidating a search that was "conducted more than an hour after federal agents had gained exclusive control of the footlocker and long after respondents were securely in custody; the search therefore [could not] be viewed as incidental to the arrest or as justified by any other exigency"); Robbins v. California, 453 U.S. 420, 425 (1981) (distinguishing between automobiles and immovable objects, the latter of which requires law enforcement to have probable cause and obtain a warrant).

[58] *Id.* (*citing* Coolidge v. New Hampshire, 403 U.S. 443, 456-457 (1971)) (the search of car in a driveway was not incident to arrest in house); *see also* Chambers v. Maroney, 399 U.S. 42 (1970) (the warrantless search of car was invalid once the arrestee has been placed in police custody); Vale v. Louisiana, 399 U.S., 30, 35 (1970) (the area within an arrestee's immediate control does not extend to the inside of house when suspect is arrested on front step).

[59] Thornton v. United States, 541 U.S. 615 (2004).

an arrestee's vehicle "when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle."[60] This time, Justice Stevens dissented, writing that "uncovering potentially valuable evidence ... must give way to the citizen's constitutionally protected interest in privacy when there is already in place a well-defined rule limiting the permissible scope of a search of an arrested pedestrian."[61] Thereafter, in *Arizona v. Gant,*[62] the Court narrowed *Belton* by limiting searches incident to arrest to areas within the arrestee's reach,[63] but re-affirmed *Thornton* by holding that searches incident to arrest are permissible where law enforcement reasonably believes "the vehicle contains evidence of the offense of arrest."[64]

By this point, *Chimel* had morphed from a narrow rule to a rule that permitted law enforcement to evade, if not entirely disregard, the Fourth Amendment's probable cause requirement. In fact, the *Chimel* justifications no longer served as meaningful limitations on searches incident to arrest, leading one commentator to note that the Supreme Court had stretched *Chimel's* reasoning "beyond its breaking point."[65]

In *Riley,* the Supreme Court had enough and established a categorical rule eschewing reliance on precedent that had, as a practice matter, swallowed the rule against unreasonable searches and seizures. As a practical matter, the Court recognized that there was no precedent to govern cell phone searches, and that, unlike automobiles, which "seldom serv[e] as one's residence or as the

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[60] *Id.* at 632.

[61] *Id.* at 635 (Stevens, J., dissenting); *see also* United States v. Ross, 456 *U.S.* 798 (1982) (expanding *Chimel* by permitting vehicle searches "for evidence relevant to offenses other than the offense of arrest").

[62] Arizona v. Gant, 556 U.S. 332.

[63] *Id.* at 351.

[64] *Id.* at 346 (discussing *Thornton*).

[65] Edwin J. Butterfoss, *Bright-Line Breaking Point: Embracing Justice Scalia's Call for the Supreme Court to Abandon An Unreasonable Approach to Fourth Amendment Search and Seizure Law*, 82 TUL. L. REV. 77, 101 (2007). *see also* South Dakota v. Opperman, 428 U.S. 364, 385 (1976) ("such a search may be made without attempting to secure the consent of the owner and without any particular reason to believe the impounded automobile contains contraband, evidence, or valuables, or presents any danger to its custodians or the public").

repository of personal effects,"[66] cell phones implicate basic privacy interests.[67] Stated simply, cases from an era of rotary telephones, roll-o-decks, and black and white televisions did not consider or even contemplate the complex interplay between digital devices, government surveillance, and civil liberties. Put differently, pen registers are not analogous to cell phone towers[68] and mobile tracking devices that law enforcement uses monitor the whereabouts of its citizens,[69] just as plastic containers are not analogous to cell phones. Importantly, however, cell phones are analogous to private homes, just as the Internet is analogous to a public sidewalk.

Second, the original meaning and purpose of the Fourth Amendment—to protect citizens from unreasonable searches—applies to conduct that the Founders could not foresee. Stating that "the ultimate touchstone of the Fourth Amendment is reasonableness,"[70] the Court correctly held that storing private information on a cell phone "does not make the information any less worthy of the protection." [71] Indeed, allowing law enforcement to conduct searches of a cell phone's contents incident to arrest would have resulted in the type of "broad, non-particularized searches," that were "one of the driving forces behind the Revolution itself."[72] The Court's decision in *Riley* ushered the Constitution into the digital era—not by interpreting the Fourth Amendment expansively, but by returning to its original meaning. Chief

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[66] Carwell v. Lewis, 417 U.S. 583, 590 (1974) (discussing arrestees' reduced expectation of privacy in automobiles).

[67] *See generally,* Katz v. United States 389 U.S. 347 (1967) (holding that the Fourth Amendment extends to all areas where an individual has a reasonable expectation of privacy).

[68] *See, e.g.,* Klayman v. Obama, 957 F.Supp.2d 1 (D.D.C. 2013).

[69] *See, e.g.,* United States v. Jones, 132 S.Ct. 945 (2012) (holding that law enforcement's use of a GPS tracking device to monitor a suspect's whereabouts for twenty-eight days violated the Fourth Amendment)..

[70] Riley v. California, 134 S.Ct. at 2482 (*quoting Brigham City,* 547 U.S. at 403).

[71] *Id.* at 2495.

[72] *Id.* at 2494 ("the Fourth Amendment was the founding generation's response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity.")

Justice Roberts' majority opinion reflects the principle that times may have changed, but that does not mean civil liberties warrant any less protection.

Riley supports a net neutrality doctrine. In the same way that the Fourth Amendment protects private data from unreasonable searches regardless of whether the data is stored in a closet or cell phone, the First Amendment protects speech from content discrimination regardless of whether it is disseminated on the sidewalk or through a search engine. It is the speech, not the device that matters, particularly because the line between public forums and personal space, and the real and virtual world has collapsed, and because free, open, and robust debate is the cornerstone of a democratic society. [73]

III. INTERNET SPEECH: THE NEW MARKETPLACE OF IDEAS

Internet speech is equivalent to the physical areas that the Court has traditionally designated as a public or limited purpose public forum.

A. Public and Limited Purpose Public Forums

Unlike *Riley,* legal issues involving online speech are not governed by outdated case law. To the contrary, the Court's precedent provides the framework by which to protect speech in the virtual world.

To begin with, the level of protection afforded to speech, and the validity of government regulations, depends in substantial part on the forum within which it is expressed. The Court has classified forums as: (1) public; (2) designated or limited purpose public; and (3) non-public. Of course, private property owners may restrict access to their property and prohibit unwanted speech.

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[73] *See, e.g.,* Mark C. Alexander, *Citizens United and Equality Forgotten,* 35 N.Y.U. REV. L. & SOC. CHANGE 499, 503 (2011) ("Speech is at the core of our democratic process, and is an essential part of "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").

1. Public Forums

Public forums are places that "by long tradition or by government [] have been devoted to assembly and debate."[74] These areas have "immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[75] Thus, "the rights of the state to limit expressive activity are sharply circumscribed."[76] The government may not regulate speech based on its content[77] unless it is "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."[78] It may, however, enact reasonable restrictions of time, place, and manner, provided they are "content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."[79] Public streets and parks are examples of public forums.[80]

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[74] *Perry Educ. Ass'n,,* 460 U.S. at 45.

[75] Hague v. Committee for Indus. Org., 307 U.S. 496, 515 (1939).

[76] *Perry Educ. Ass'n.,* 460 U.S. at 45.

[77] In determining whether speech regulations impermissibly discriminate based on content, the courts examine whether the regulation restricts speech because of disagreement with its message. *See, e.g., Clark*, 468 U.S. at 295 (1984) ("[t]he principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys; *see also Frisby,*487 U.S. at 474 ("[t]he government may not regulate use based on hostility—or favoritism—towards the underlying message expressed"); Roth v. United States, 354 U.S. 476, 484 (1957) ("[a]ll ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of [First Amendment] guaranties").

[78] *Perry Educ. Ass'n*, 460 U.S. at 45. (*citing Carey,* 447 U.S. at 461).

[79] *Id.* (*citing* United States Postal Service v. Council of Greenburgh, 453 U.S. 114, 132 (1981)); Consolidated Edison Co. v. *Public* Service Comm'n, 447 U.S. 530, 535–536 (1980)).

[80] *Id.*

2. Designated or Limited Purpose Public Forums

A designated or limited purpose public forum consists of "public property that the state has opened for use by the public as a place for expressive activity."[81] Public schools, university meeting facilities, and municipal theaters typically fall within this category.[82]

The same standards governing regulation of speech in a traditional public forum should apply to limited purpose public forums.[83] Thus, unless narrowly tailored to achieve a compelling interest, [84] content-based exclusions are impermissible "even if [the state] was not required to create the forum in the first place."[85]

3. Nonpublic Forum

Non-public forums consist of public property that "is not by tradition or designation a forum for public communication."[86] As a result, "the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[87] In other words, content-based regulations are permissible, but once the government allows speech on a particular topic (e.g., abortion) in a non-public forum, it may not discriminate based on the speaker's view about that topic.[88]

B. Content and Viewpoint Discrimination in the Internet's

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[81] *Id.*
[82] *See id.* (*citing* City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n, 429 U.S. 167 (1976)); Widmar v. Vincent, 454 U.S. 263; Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975)); see also First Amendment Schools, *What is a Public Forum,* available at http://www.firstamendmentschools.org/freedoms/faq.aspx?id=13012
[83] *Perry Educ. Ass'n,* 460 U.S. at 45.
[84] *Id.* at 46.
[85] *Id.* (brackets added).
[86] *Id.* at 46
[87] *Id.*
[88] *Id.*

Public, Limited Purpose, and Non-Public Forums

The Internet is the equivalent of traditional public forums, limited purpose public forums, and non-public forums. The Internet's traditional public forum refers to the free and open transfer of data between networks, which ISPs control. The Internet's limited purpose public forum refers to websites that are held out to the public as forums for debate on matters of public concern. Non-public forums refer to personal blogs, websites, and social media where the owner has an unconditional right to speak and assemble without granting access to disfavored content or viewpoint. The Pre-Digital Era Analogs to Digital Devices Table below provides examples of online public, limited purpose, and private forums.

PRE-DIGITAL ERA ANALOGS TO DIGITAL DEVICES

HISTORICAL ANALOG	DIGITAL DEVICE	STANDARD
PRIVATE RESIDENCE	CELL PHONE	PROBABLE CAUSE AND A WARRANT UNLESS LAW ENFORCEMENT CAN SHOW EXIGENT CIRCUMSTANCES
SIDEWALK OR STREET CORNER (TRADITIONAL PUBLIC FORUM)	(INTERNET) FREE FLOW OF INFORMATION BETWEEN NETWORKS	STRICT SCRUTINY
LIMITED OR DESIGNATED PUBLIC FORUM	(INTERNET) WEBSITES THAT ARE FORUMS FOR	REASONABLE RESTRICTIONS OF TIME, PLACE, AND

	PUBLIC DISCUSSION ON MATTERS OF PUBLIC CONCERN (E.G., HUFFINGTON POST);	MANNER PROVIDED THEY ARE CONTENT-NEUTRAL[89]
NONPUBLIC FORUM	EMAIL, FACEBOOK, TWITTER, CHAT ROOMS, PRIVATE BLOGS, CLOSED GROUPS	CONTENT-BASED RESTRICTIONS ARE PERMISSIBLE

As discussed below, ISPs and website operators can infringe substantially on first Amendment Protections. First, ISPs can discriminate on the basis of the user's identity (e.g., a business competitor or political rival) or the content of a user's speech. Second, websites operators can discriminate based on viewpoint, either by deleting disfavored comments or restricting access to members who have unpopular opinions. Both practices violate the First Amendment.

1. Preventing Content Discrimination in the Traditional Public Forum: Treating ISPs As Common Carriers or Radio Broadcasters

Without a new neutrality doctrine, First Amendment freedoms in the virtual world will be under attack in the same way that privacy rights were under attack before *Riley.*

ISPs can compromise free speech protections in a variety of ways. The first is through "traffic shaping," [90] a practice that "involves slowing down some forms of traffic, like file-sharing,

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[89] Some courts apply different tests depending on whether the speaker falls within the class of individuals that the government intended to benefit by creating limited public forum. *See, e.g.,* Fighting Finest v. Bratton, 95 F.3d 224, 225-28 (2d Cir. 1996) (if the speaker falls within the intended class, strict scrutiny is applied; if the speaker falls outside of the class, rational basis review is applied).
[90] Steffe, *supra* note 4, at 1158.

while giving others priority."[91] This is accomplished by limiting available bandwidth, which enables ISPs to favor certain categories of speech over others. Comcast, for example, has been accused of manipulating the available bandwidth of its users so that users of popular peer-to-peer programs, such as BitTorrent and eDonkey, would become frustrated and terminate any pending transfers."[92] This practice is akin to allowing pro-life advocates to march in the public square, while restricting pro-choice advocates to a dark alley near a cemetery. It permits ISPs to discriminate against "websites that are resource intensive ... offer services that might compete against an ISPs own services ... or even discourage traffic to networks it disapproves."[93]

In addition, ISPs can restrict access to online content. For example, ISPs view websites, such as CNN, as potential sources of income and charge user fees to access an ISP's subscribers, which can number in the millions.[94] This permits ISPs to "hold a website at ransom"[95] and forces websites "to choose between complying and exploring new sources of revenue by either eliciting higher fees for advertising on their websites or charging users fees for use, or simply dissolving."[96] What is worse, organizations that sell commercial products or promote public debate on matters of political and social importance may fail to reach a substantial audience and, in some cases, cease operating altogether. Simply put, ISPs can structure their fees in a manner that undermines competition, thwarts innovation, *and* frustrates open public debate.

The effect on users is substantial. By restricting access to, or slowing the delivery of, commercial and political speech, users are deprived of vast quantities of information. The Internet is a hub for free market competition, the free exchange of information, and the free flow of ideas on topics that span the political, social, artistic, and literary spectrum. Indeed corporations throughout the

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[91] *Id.* at 1158 (*quoting* Peter Svensson, *Comcast Blocks Some Internet Traffic*, MSNBC (Oct. 19, 2007), available at http://www.msnbc.msn.com/id/21376597/).
[92] Steffe, *supra* note 4, at 1158.
[93] *Id.* at 1156-57.
[94] *Id.*
[95] *Id.* at 1159.
[96] *Id.*

world "rely heavily on the Internet and services provided over the Internet to conduct business ... [and] to communicate efficiently."[97] Furthermore, the Internet has taken center stage in political campaigns and become a forum for public debate over matters that promote the very foundation our individual freedoms are based upon.[98] One commentator states:

> Despite the scant attention it received from politicians during the 1990s, early online political activists expected the Internet to be "*the* dominant political medium by the year 2000." While their timetable for dominance may have been a bit optimistic, the massive growth in Internet use during the last few years of the twentieth century began the push in that direction. In 1997, only eighteen percent of households had an Internet connection. By 2000, that number had grown to forty-two percent.[99]

Indeed, "[b]y 2003, 54.7 percent of American households had Internet access ... [and] the Internet was ready to play a criti-

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[97] *Id.*(brackets added).

[98] *See* D. Wes Sullenger, *Silencing the Blogosphere, A First Amendment Caution to Legislators Considering Using Blogs to Communicate Directly with Constituents* 13 RICH. J.L. & TECH. 15, 54-55 (2007).

[99] *Id.* at 53-54. At the beginning of the twenty-first century, politicians began using the internet as a campaign tool:

> Thanks to increased accessibility, by the 2000 election, presidential candidates viewed the Internet as an ally. Candidates used the Internet to raise money, to make announcements, and to post their policy positions, speeches, and criticisms of their adversaries. Also by the 2000 election cycle, candidates had begun coupling these less-passive websites with database technology to identify likely voters who might be receptive to their messages. This technology let politicians tailor their messages to specific voters so they could, through technology, establish a "personal, one-on-one relationship" with citizens. *Id.*

cal role in political campaigning."[100] In 2004, "[g]overnments throughout the United States had begun trying to connect the public to the government through 'e-government' initiatives,"[101] which enables citizens to "e-mail government staff directly and to access public services online."[102] During this period, "thousands of citizens [became] high-tech colonial pamphleteers in a planetary public square, using computers and modems to recruit and organize without leaving their keyboards."[103]

To prevent ISPs from infringing on First Amendment protections, the FCC treats ISPs as common carriers, preventing ISPs from charging different prices, and interfering with or manipulating the Internet traffic based on a user's identity, or the content of a user's message. The Communications Act of 1934 provides the statutory basis for justifying such a regulation:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.[104]

Indeed, just as the Pacific Telegraph Act prohibited the "processing and relaying [of] private telegraphs on any other basis than in the order in which received,"[105] a net neutrality doctrine would prohibit ISPs "from interfering with the transmission of packets over their networks, whether by artificially slowing down

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[100] *Id.* (brackets added).
[101] *Id.* at 57.
[102] *Id.*
[103] *Id.* (brackets in original).
[104] Steffe, *supra* note 4, at 1154-55.
[105] *Id.*

or blocking those packets, or by any other means that selectively inhibits the natural flow of packets over their network."[106]

As the FCC has recognized, consumers would benefit substantially from a net neutrality doctrine:

> Consumers are entitled to access the lawful Internet content of their choice ... to run applications and use services of their choice, subject to the needs of law enforcement to connect their choice of legal devices that do not harm the network[;] . . . [and] to competition among network providers, application and service providers, and content providers.[107]

In fact, the Court has recognized that First Amendment principles apply to the Internet precisely because it has become a forum for disseminating protected speech:

> Unlike the conditions that prevailed when Congress first authorized regulation of the broadcast spectrum, the Internet can hardly be considered a "scarce" expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds ... This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer ... our cases provide no basis for qualifying the level of First Amend-

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[106] *Id.* at 1155.
[107] *Id.*

ment scrutiny that should be applied to this medium.[108]

The proper way to promote free speech and guard against content-based discrimination is through a new neutrality doctrine.

ISPs may argue that decisions regarding pricing constitute commercial speech, and that regulating this practice would amount to impermissible restrictions on this speech. In addition, even if ISPs were subject to the First Amendment, practices involving pricing are based on content neutral factors, such as the numbers of emails a corporation sends. This argument fails to consider that ISPs have primary control over the flow of information between networks, and thus have the power to infringe on free speech rights. Additionally, otherwise-permissible speech may be regulated if the secondary effects of this speech bring it into a category that does not enjoy First Amendment protection.[109]

2. *Limited Purpose Public Forum: Websites For Public Comments on Matters of Public Concern*

ISPs are not the only entities that can infringe First Amendment freedoms online. Various websites such as The National Review and Huffington Post hold themselves out as forums for debate on political and social issues. In doing so, these websites make available to the public a forum within which users can debate a variety of public policy issues. This certainly enhances the robust exchange of information and creates an online marketplace of ideas historically, but it can also be a vehicle for viewpoint discrimination, in the same way that cell phones became a vehicle for intrusive searches into an individual's private life.

For example, National Review Online, a conservative forum, could require that registered democrats pay a twenty-five dollar fee before gaining access to the "Comments" section of each

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[108] Reno v. ACLU, 521 U.S. 844, 870 (1997) (internal citations omitted).

[109] *See, e.g.*, Mark Rienzi & Stuart Buck, *Neutral No More: Secondary Effects Analysis and the Demise of the Content-Neutrality Test*, 82 FORDHAM L. REV. 1187 (2013); *see also R.A.V.*, 505 U.S. at 389 (*quoting* Renton v. Playtime Theaters, Inc., 475 U.S. 41, 48 (2006)).

article. Alternatively, National Review could carefully filter or any comments that it disfavors or deems contrary to conservative ideology. Similarly, the Huffington Post could decide to charge registered republicans a ten-dollar "access fee" and reserve the right to modify or remove comments it deems 'too conservative.

Of course, both the National Review and Huffington post have the right to remove all comments that are obscene, defamatory, or likely to incite violence, and even have the leeway to remove offensive comments. This is not a license, however, to allow user comments on political issues, yet to subjectively skew the debate by discriminating opposing viewpoints. In other words, websites and blogs that are marketed out as venues for public discussion are limited purpose public forums; they may regulate the time, place, and of speech, but such regulations must not be thinly veiled attempts to discriminate on the basis of a user's viewpoint.

Put differently, having made the choice to invite public comments, these websites have the responsibility to comply with the law. For example, when private individuals who open a business that serves the public, or rent homes to prospective buyers, they cannot refuse to serve African Americans, regardless of the storeowner or landlord's privately held beliefs. The same principles should apply to websites holding themselves out as a forum for public comment on matters of public concern.

Additionally, the FCC can regulate ISPs in the same way that it regulates public broadcasting with the equal time rule,[110] which requires broadcasting stations "that permit candidates to appear on their airwaves [to] allow opposing candidates the same privilege."[111] This rule is subject to a variety of exceptions, but is based on the principle that "those who control access to them are viewed as being responsible for what those who are not in control get to see and hear."[112] The same holds true on the Internet because website operators, like ISPs, have the exclusive authority to control how information is accessed, expressed, disseminated. Allowing the internet to become a breeding ground for content and

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[110] Anne Kramer Ricchiuto, *The End of Time for Equal Time? Revealing the Statutory Myth of Fair Election Coverage*, 38 IND. L. REV. 267, 268 (2008)
[111] *Id.* [brackets added].
[112] *Id.* at 269.

viewpoint-based discrimination would eviscerate core First Amendment freedoms in an electronic medium that, like cell phones, is pervasive in modern society.

3. Non-Public Forums

Non-public forums, which would include personal websites and blogs, do not implicate First Amendment concerns. In non-public forums, the First Amendment protects each individual's right of assembly and association, both of which would be infringed if individuals were required to accommodate opposing viewpoints in forums that are not held out to or intended for public debate.

IV. CONCLUSION

Recent innovations in technology ushered civil liberties into the virtual world. Consequently, the law must adapt by providing legal protections to the civil liberties of individuals who speak, assemble, and associate in that world. The original purposes of the First Amendment, which from time immemorial have protected civil liberties and preserved the free, open, and robust exchange of information, support net neutrality. After all, laws or practices that violate cherished freedoms in the physical world also violate those freedoms in the virtual world. The battle over net neutrality is "is absolutely the First Amendment issue of our time," just as warrantless searches of cell phones were among the Fourth Amendment issues of our time.