# Volume VII

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SPORTS AND ENTERTAINMENT LAW JOURNAL

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LETTER FROM THE EDITOR

Dear Reader,

With much enthusiasm, we are pleased to present the Fall 2009 issue of the University of Denver Sports and Entertainment Law Journal. This issue abounds with enthralling legal analysis of contemporary issues touching on sports and entertainment law. Our authors advance legal commentary from their diverse perspectives as law students, practitioners, and professors alike.

The legal issues engaged in this issue range from a review of Title IX and its impact on collegiate athletics to a commentary on the current status of India’s constitutionally-protected right to free speech. Another author considers the potential repercussions of a recent First Circuit decision that establishes a new precedent and rewrites the traditional analysis of a libel claim. Our final author examines the context in which the government communicates its message to the public, arguing that restrictions on government speech should focus on the medium of communication, rather than the content. Each of these authors offers compelling insight and thorough analysis of the legal issues addressed. We would like to thank them for their hard work and their contributions to the Fall 2009 issue of the University of Denver Sports and Entertainment Law Journal!

Trey Douglass
Editor-in-Chief
TITLE IX: THE STORY OF A PROVISION IN NEED OF REFORM

Ben Adams

I. INTRODUCTION

Throughout history, there have been times at which a government must act in order to protect those who have been disadvantaged. The American people, over history, have worked to create an atmosphere in which all Americans are able to compete on a more level playing field. Staples of the American Government, as it has been designed, are examples of this. The progressive tax system is an active statute, which hopes to shift the burden of funding our government from those who are not able to gain as much financially to those who are in a more financially secure position. Another example is the Equal Employment Opportunities legislation, which seeks to create an environment of fair employment for those of all different backgrounds. Much like the Equal Employment Opportunities Legislation, Title IX, of the United States code of education, signed into law in 1972, was created in order to provide and protect opportunities for women. Title IX has attempted to remove many barriers and discrepancies that once prevented people, on the basis of gender, from participating in educational opportunities and careers of their choice. It states that:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

Title IX was passed in 1972 as an amendment, and unfortunately, does not have much well documented legislative history. However, the legislative history of Title IX did begin when it was introduced in the Senate by Senator Birch Bayh of Indiana, who explained that its purpose was to combat "the continuation of corrosive and unjustified discrimination against women in the American educational system."

While arguing in behalf of his legislation, Senator Bayh pointed to the fact that economic inequities suffered by women can often be traced to educational inequities, and this new legislation would be a step toward remedying the situation. Senator Bayh argued that there was a link between discrimination in education and subsequent employment opportunities “The field of education is just one of many areas where differential treatment [between men and women] has been documented but because education provides access to jobs and financial security, discrimination here is doubly destructive for women. Therefore, a strong and comprehensive

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1 See 26 U.S.C. § 1.
3 42 U.S.C. § 21
4 20 U.S.C. § 1681
5 Id.
6 Id.
7 118 Cong. Rec. 5803 (1972).
measure is needed to provide women with solid legal protection from the persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women.”8

Through the implementation of Title IX, the numbers of women in sports have greatly increased.9 Women collegiate athletes have actually increased more than five times their numbers, from 31,852 to 170,526, since the implementation of Title IX.10 However, not all is well and good in the world of Title IX application to collegiate athletics. “[I]t’s been a bust for men’s Olympic sports.”11 Many schools are being forced to cut men’s programs, as compliance with this provision has become incredibly difficult by simply continuing to add women’s programs, as this is very cost prohibitive.12 One study has estimated that over 2,200 men’s teams have been eliminated since 1981.13 There are even those who believe that Title IX may be a cause for the decline in performance of our men’s athletic teams.14

a. Has Title IX Run its Course?

In reviewing Senator Bayh’s stated reasoning for Title IX, it is quite obvious that the intentions of those who ratified Title IX in 1972 were to rectify the discrepancy in the numbers of post secondary degrees that were conferred upon members of both sexes. At the time of Title IX’s discussion and creation, undergraduates who were female only accounted for 42 percent of all undergraduates.15 However, by 2003, women received 57.9% of the degrees conferred from postsecondary schools.16 Since the late 1970s, as seen in the table below,17 at least half of all part-time students have been female, and since 1985, a majority of full-time students have been female.18

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8 Id. at 5806-07.
17 NATIONAL CTR. FOR EDUCATION STATISTICS, supra note 15, at 71.
18 Id.
Having seen these statistics, there is reason to see that Title IX has been successful in Senator Bayh’s goal of providing educational opportunity for women, so that they may have access to higher employment opportunity. However, not all of Title IX’s implications have resulted in such a success. In the arena of Collegiate Athletics, as this comment will attempt to address, Title IX has had a negative effect on male students, and more specifically those who wish to be student athletes.

In general, student athletes have a higher rate of graduation that those students who do not participate in intercollegiate athletics.\textsuperscript{19} Sixty-two percent of NCAA student-athletes who entered Division I colleges and universities in 1997 graduated, in comparison to the overall student body, which only graduated sixty percent.\textsuperscript{20} This is illustrated bellow:\textsuperscript{21}

\textsuperscript{20} Id.
However, when digging deeper into the numbers, the data show that the graduation rate for male student-athletes who began college in 2000 is 71.5 percent, compared to women over the same time period, who graduated at 87.3 percent.\textsuperscript{22} It can be inferred that male student athletes are actually lowering the graduation success rate of both males and athletes in general. This trend is shown in the table bellow:\textsuperscript{23}

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\textsuperscript{22} Press Release, Bob Williams, Nat’l Collegiate Athletic Assoc., Trend Data Shows Graduation Success Rate Improvement (Oct. 3, 2007) (on file with author).

\textsuperscript{23} Nat’l Collegiate Athletic Assoc., supra note 21.
NOTE: The chart above compares male and female students with male and female student athletes (S-As). The dates represent the date upon entrance of an institution of higher learning. Their Graduation Success Rate (GSR), is determined by the rate at which students graduate within five years of entering their institution.

In a large part, this is attributable to the low graduation rate of male athletes from the revenue producing, popular sports. The graduation rate for men’s basketball was 63.6 percent for those entering college in 2000, for football, the class entering in the year 2000 only had a 66.6 percent graduation rate in the Bowl Subdivision and 64.7 percent for teams competing in the Championship Subdivision.\(^{24}\) Baseball held a 67.3 percent graduation rate.\(^{25}\) On the other-hand, even further examination shows that other men’s sports tend to excel, at least with respect to graduation rates, as well as their women’s sport counterparts. Unfortunately, it is just those sports that are being eliminated because schools must attempt to comply with Title IX.\(^{26}\) Even though some of these sports may be cut for reasons other than Title IX, the reason a male sport is cut for budgeting purposes is a direct result of title IX.\(^{27}\) Therefore, it is quite clear from the statistics that the male student athlete graduation rates are hindered by the elimination of certain sports for compliance with Title IX.\(^{28}\) Athletes who would increase the rate at which males graduate are losing their funding for college, in order to retain those athletes who have a much lower rate of graduation. This cannot be a desired effect of the law. The point of collegiate athletics is to enhance student athletes. This effect is illustrated in the table below:\(^{29}\)

\(^{24}\) Id.
\(^{25}\) Id.
\(^{26}\) See generally Ann Coulter, Title IX Defeats Male Athletes, USA TODAY, July, 25, 2001, available at http://www.usatoday.com/news/opinion/2001-07-25-ncquest2.htm; Katie Thomas, Women Want to Wrestle; Small Colleges Oblige, N.Y. TIMES, May 27, 2008 (“Dozens of men’s teams have been eliminated over the past three decades, a phenomenon many coaches attribute to Title IX.”).
\(^{28}\) As Football, Baseball and Basketball have lower graduation rates than the average, they drag down the graduation rate. In general, student athletes graduate at a higher rate than the general student population. As Football, Baseball, and Basketball players compose a higher percentage of the male student athletes, they push their counterparts, who play other sport, out of opportunities.
\(^{29}\) Nat’l Collegiate Athletic Assn., supra note 21.
NOTE: The chart above compares male students with male student athletes (S-As). The dates represent the date upon entrance of an institution of higher learning. Their Graduation Success Rate (GSR), is determined by the rate at which students graduate within five years of entering their institution. This chart illustrates the graduation rate differences for the major revenue producing sports (Football, Basketball, and Baseball) compared with those of track and other minor sport athletes.

These statistics may not convince everyone. With statistics such as these, people can always see what they want within them. Therefore, I cannot solely base my article on these statistics. There are other issues with Title IX, things that both sides of the argument would agree with. Those who are against Title IX believe that the law should be reformed.\(^{30}\) However, others believe that the law is not well enough enforced, to the point that many schools should be severely punished.\(^{31}\) The remainder of this comment will focus on these arguments, and how Title IX is in need of reform, in order to accomplish its goals in advancing women, and not inhibiting men.

b. Is this Really Accomplishing Our Goals?

If the above negative influences of Title IX are not enough to convince one that Title IX has run its course and needs and over-haul, Title IX may need to be re-examined as to what compliance really is, and what it really should be.

There are some who believe that Title IX does not even accomplish its goals, and has not yet reached a point at which there is equality.\(^{32}\) This is a compelling argument, if true; however, it may not be completely accurate. One of the problems with compliance, which is identified in an article about how the University of Illinois is not in compliance with Title IX or at least from the view of the author’s opinion of Title IX compliance, is that compliance could be, to borrow a phrase from another context, “in the eye of the beholder”.\(^{33}\)

As stated by Lester Munson, a Chicago-based lawyer and senior sports columnist for ESPN, “If you accept the effort and see [the underrepresented gender] as equal you’ll never have a problem[].”\(^{34}\) Munson’s quote demonstrates a problem with compliance and its potentially subjective nature.\(^{35}\)

James Madison University has one of the greatest examples of a Title IX ‘battle’.\(^{36}\) Students from the University of Maryland, Rutgers University, Howard University, George Washington University and American University joined those from James Madison in protest of the actions taken in cutting ten sports mainly to comply with Title IX.\(^{37}\) A spokesperson for the College Sports Council, an organization dedicated to reforming Title IX, Jim McCarthy stated, “.

\(^{32}\) Id.
\(^{33}\) Id.
\(^{34}\) Id.
\(^{35}\) Id.
\(^{37}\) Id.
. . the original wording of Title IX is terrific, [however] [w]e believe that no student should be denied the opportunity to play a sport based on gender. But the proportionality quota has led to all of these teams being cut.”

Having such opposed forces can illustrate that there need to be reforms to a given regulation. Both sides of this argument have their valid points, but one thing is clear, both sides are hurt from the law, as is. While this may be a problem engrained in American culture, with the disproportionate amounts of resources needed and produced as there is no female equivalent of men’s collegiate football, something needs to be done. As JMU junior track athlete Mark Rinker said while discussing losing his team to a supposed Title IX cut, “This isn’t going to stop at JMU. This is a trend that started years ago, and it’s going to continue to keep happening. We’re so close to Washington. I just think it’s something that we should do to keep other people from having the same pain we felt the last month.”

As shown above, Mark Rinker is not the only one who has been harmed by this unfortunate situation. Over 2,200 men’s teams have been eliminated since 1981. Many of these teams are men’s wrestling teams, men's gymnastics teams, men’s tennis teams, men’s track and field teams, and men's swimming and diving teams. Eliminating programs such as this is the “path of least resistance” to Title IX compliance. It is not just struggling programs that are eliminated, either. Many programs of past glory, such as the University of Miami Men’s Swimming and Diving Team, which produced such greats as Greg Louganis, have also been eliminated. “College administrators have been lazy over the years, axing men's scholarships and programs in order to comply with Title IX. It's the easy way out. Those college administrators have acted first out of fear, intimidation and/or ignorance rather than a well-reasoned examination of Title IX.”

II. HISTORY OF APPLICATION

a. Passing the bill

Though Title IX was no doubt passed with good intention, it is riddled with vagueness. The prior mentioned lack of legislative history does little to clarify the cloudiness of the intent,

38 Id.
42 Leung, supra note 40.
43 Dodd, supra note 41.
44 Courtney W. Howland, Sex Discrimination and Intercollegiate Athletics: Putting Some Muscle on Title IX, 88 YALE L.J. 1254, 1255 (1979).
and there is even less discussion of its application to athletics, as a matter of fact, sports were only mentioned twice.\textsuperscript{45}

Even the architect of Title IX, Senator Bayh, was not very clear on how to enforce his statute. Senator Bayh had to compromise with the minority Republicans, and specifically Representative Quie, of Minnesota. A very clear way in which this could have been accomplished would have been through quotas of some sort, but he did not want this to be the way in which Title IX was enforced. The following quote is an illustration as to why there were no quotas:

As you know, the House attached a floor amendment specifying that the legislation would not require specific quotas. I did not include such a provision as part of the Senate amendment because I believe my amendment already states clearly that no person, male or female, shall be subjected to discrimination. The language of my amendment does not require reverse discrimination. It only requires that each individual be judged on merit, without regard to sex.\textsuperscript{46}

b. Further Legislative Development

As a matter of fact, sports were never mentioned in the original law, and were added in a 1975 amendment.\textsuperscript{47} Under the regulation, “[a] recipient which operates or sponsors interscholastic, intercollegiate, club, or intramural athletics shall provide equal athletic opportunity for members of both sexes.”\textsuperscript{48} In order to determine compliance with the statute, it prescribes factors for measuring whether there is “equal opportunity for members of both sexes.” These factors are as follows:

(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
(2) The provision of equipment and supplies;
(3) Scheduling of games and practice time;
(4) Travel and per diem allowance;
(5) Opportunity to receive coaching and academic tutoring;
(6) Assignment and compensation of coaches and tutors;
(7) Provision of locker rooms, practice and competitive facilities;
(8) Provision of medical and training facilities and services;
(9) Provision of housing and dining facilities and services;
(10) Publicity.\textsuperscript{49}

\textsuperscript{45} Id. Title IX was adopted in conference without formal hearings or a committee report. See S. Rep. No. 798, at 221-22 (1972). See generally Harold H. Bruff & Ernest Gellhorn, Congressional Control of Administrative Regulation: A Study of Legislative Vetoes, 90 Harv. L. Rev. 1369, 1388-89 (1977); sports were only mentioned twice in the congressional debate. See generally 118 Cong. Rec. 5807 (1972) (statement of Sen. Bayh) (personal privacy to be respected in sports facilities); 117 Cong. Rec. 30,407 (1971) (statement of Sen. Bayh) (intercollegiate football and men's locker rooms).

\textsuperscript{46} 117 Cong. Rec. 30,406-07; Danielle M. Ganz, After the Commission: the Government's Inadequate Responses to Title IX's Negative Effect on Men's Intercollegiate Athletics, 84 B.U. L. Rev. 543, 547 (2004).

\textsuperscript{47} 34 C.F.R. § 106.41(c) (2009).

\textsuperscript{48} Id.

\textsuperscript{49} Id.
The very first factor, with the “interests and abilities” creates an ambiguous standard, however, according to the regulations, many institutions had only one year within which to comply.\textsuperscript{50} The government did not attempt to clarify its position on athletic programs until December of 1979, as what is now the Office of Civil Rights issued an Intercollegiate Athletics Policy Interpretation.\textsuperscript{51} The Office of Civil Rights attempted to address three areas, with the most significant being the compliance with the “interests and abilities”\textsuperscript{52} factor mentioned above.\textsuperscript{53} The Policy Interpretation was the first mention of the three part test. To comply, a university need only comply with one prong of a three prong test.\textsuperscript{54} The parts are:

(1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
(2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
(3) Where the members of one sex are underrepresented among intercollegiate athletes and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.\textsuperscript{55}

c. Application to College Athletics

One might wonder how this legislation, dealing with federal funding, can be applied to either private institutions, or those run by the states. The Supreme Court accomplished this in the landmark case of \textit{Grove City College v. Bell}.\textsuperscript{56} Federal financial assistance may be received directly or indirectly, and the university received it indirectly through the federal financial aid program that was given to veterans.\textsuperscript{57} In reaching its conclusion, the Court considered the congressional intent and legislative history of the statute in question to identify the intended recipient. The Court found that the 1972 Education Amendments, of which Title IX is a part, are "replete with statements evincing Congress' awareness that the student assistance programs established by the Amendments would significantly aid colleges and universities. In fact, one of the stated purposes of the student aid provisions was to 'provid[e] assistance to institutions of

\textsuperscript{50} 34 C.F.R. § 106.41(d) (2009).
\textsuperscript{52} 34 C.F.R. § 106.41(c).
\textsuperscript{53} 34 C.F.R. § 106.41(d).
\textsuperscript{54} Aronberg, supra note 51, at 757.
\textsuperscript{55} OCR Policy Interpretation, 44 Fed. Reg. at 71,418.
\textsuperscript{57} Id. at 564.
higher educations.’ Pub. L. 92-318, § 1001(c)(1), 86 Stat. 831, 20 U.S.C. § 1070(a)(5)”.\textsuperscript{58}  The court in \textit{Bob Jones Univ.},\textsuperscript{59} which can be read as a complement to and clarification of \textit{Grove City}’s holding, stated that even if the financial aid to the veterans did not reach the university this would be considered financial assistance to the school since this released the school’s funds for other purposes.\textsuperscript{60}  Therefore, a university may be deemed to have “received Federal financial assistance” even if that university did not show a “financial gain”.\textsuperscript{61}

Title IX’s application to collegiate athletics was even further clarified by the Court in 1999.\textsuperscript{62}  The Supreme Court in \textit{NCAA v. Smith} followed along with and cited \textit{Grove City} and \textit{Bob Jones University},\textsuperscript{63} in stating that while dues paid to an entity (NCAA) by colleges and universities, who were recipients of federal financial assistance, “at most ... demonstrates that it [NCAA] indirectly benefits from the federal assistance afforded its afforded members.” But the Court stated, “This showing, without more, is insufficient to trigger Title IX coverage.”\textsuperscript{64}  “Entities that receive federal assistance, whether directly or through an intermediary, are recipients within the meaning of Title IX; entities that only benefit economically from federal assistance are not.”\textsuperscript{65}

d.  How are College Athletic Programs Complying

The statute implies a preference for schools to comply with Title IX on their own, without monitoring.\textsuperscript{66}  There are many different tests to determine compliance with Title IX,\textsuperscript{67} listed above, with which schools must comply, however, much of the focus has centered on the three-part test.\textsuperscript{68}  In addition, an institution does not have to specify what prong they are attempting to comply with until a complaint is filed against them.\textsuperscript{69}

In general, athletic directors believe, and only trust, in their compliance with the proportionality prong.\textsuperscript{70}  This is because the proportionality prong is the only fully objective, quantifiable test of the three. Since no clear standards, even through litigation, have been developed for the second two prongs, they are not of meaningful use to many schools, who are interested in avoiding litigation at all costs.\textsuperscript{71}  The government has therefore effectively led

\textsuperscript{58} Id. at 565-66.
\textsuperscript{59}  Id. at 569.
\textsuperscript{60}  Id. at 602.
\textsuperscript{61}  Id. at 602-03.
\textsuperscript{63}  Id. at 470.
\textsuperscript{64}  Id. at 468.
\textsuperscript{65}  Id.
\textsuperscript{66}  20 U.S.C. § 1682 (2000) (the statute won’t come into effect until someone reports a non-compliance and then fails to rectify the discrepancy).
\textsuperscript{67}  Supra Part 2.b.
\textsuperscript{68}  OCR Policy Interpretation, 44 Fed. Reg. at 71,418; Aronberg, supra note 51, at 757.
\textsuperscript{69}  OCR complaints may be filed by individuals or groups, and investigations may also be initiated by the OCR itself. U.S. GEN. ACCOUNTING OFFICE, GENDER EQUITY: MEN’S AND WOMEN’S PARTICIPATION IN HIGHER EDUCATION 7-8 (2000)
\textsuperscript{71}  U.S. GEN. ACCOUNTING OFFICE, supra note 69, at 38-40.
schools to infer that “the only surefire way to abide by Title IX was to achieve what's called proportionality.”  

The second prong, which requires a history and continuing practice of program expansion, is more of a temporary device than a permanent solution. This prong used to be very easily attained, as most schools had almost no women’s programs and it was very easy to add programs, however, after the tremendous growth of women's sports at the intercollegiate level, it has become difficult to keep adding teams and increasing budgets to have an ongoing history and thus satisfy this prong.

The third prong requires schools to accommodate the interests and abilities of their female student body. In order to satisfy this prong, a court must look at whether female students have a certain interest in a particular sport at a school, and the school does not provide for that interest. Therefore, if viewed in its most strict and literal sense, the language of this prong has created a belief that in order to be in compliance, schools must approve all requests to recognize new women's teams. Without a clearer definition of the second two prongs, most universities will continue to plan their compliance with Title IX by following the first prong, despite statements that “no one prong is favored.”

e. Complying with the first prong

If an institution wants to comply with the proportionality prong, and as discussed above, this is the most prevalent of the strategies, they may do so in three ways: 1) increase opportunities for women, 2) reduce opportunities for men, or 3) a combination of both. The goal of Title IX is to add programs for women, however, it is much less expensive to cut a men's team than it is to add a women's. This is directly against the true spirit of Title IX. The Office of Civil Rights, in 1996, noticed that many institutions face increasing budget constraints, but it thought it could work with institutions to find “creative solutions” to ensure equal opportunities in intercollegiate athletics. The OCR's stated solutions included identifying national and regional interest levels for particular sports and adding women's teams or elevating club teams to varsity status based on these interest levels. However, this is not the only way in which to comply, and unfortunately, the majority of solutions to this issue, by athletic directors, do not follow the spirit of Title IX.

The Director at the Tucker Center for Research on Girls and Women in Sport at the University of Minnesota, Mary Jo Kane, has been quoted stating, “[t]he issue of whether girls

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72 Leung, _supra_ note 40.
76 Letter from Gerald Reynolds, Assistant Sec’y for Civil Rights, Dep’t of Educ. (July 11, 2003), _available at_ http://www.ed.gov/about/offices/list/ocr/title9guidanceFinal.html?exp=0.
77 See Farrell, _supra_ note 73, at 1052-53.
78 Letter from Norma V. Cantú, Assistant Sec’y for Civil Rights, Dep’t of Educ. (Jan. 16, 1996), _available at_ http://www.ed.gov/print/about/offices/list/ocr/docs/clarific.html.
79 Id.
should play sports is off the radar screen. It’s now moved to ‘What sport should that be?’

Some institutions have been attempting to add women's sports that are relatively inexpensive to operate and carry a large number of participants, such as rowing, to help offset the size of a football team. A ridiculous action by a completely land locked school, Kansas State, has added a rowing team, as they can cheaply add large numbers of female athletes, even though there is a lack of local demand for the sport. This does increase opportunities for women to participate in sports, however, there often is not a strong interest in the particular region to field such a team and other sports that do have a strong interest at the high school level are not added simply because the sport does not require a large number of participants to help offset the football team. “For example, although over 100 Minnesota high schools sponsor girls' cross-country ski teams and eighty sponsor girls' alpine skiing (for a total of nearly 3000 female skiing participants in Minnesota high schools alone), the university chose to add rowing and not skiing.” While on average, women's rowing teams carry forty-four participants, women's skiing teams carry only eleven. Another attempt at compliance is by controlling roster sizes, increasing women’s while decreasing men’s. This limits the ability of men’s teams to have non-scholarship athletes, while creating such opportunities for women’s teams, even though women often are not as interested as men in walking-on. This has caused coaches to treat female walk-ons unfairly. In determining proportionality figures, the OCR counts the number of student-athletes on a team as of the date of first competition. Therefore, women's teams keep a number of walk-ons on the roster through the first competition, only to cut them shortly after.

There is no doubt that these attempts at compliance are not within the spirit of Title IX. Title IX was meant to create opportunity for women, not deny it to men, nor to manipulate women.

III. THE GROWING DEMAND FOR ACTION

Challenges have been made in the 1st, 3rd, 5th, 6th, 7th, 8th, 9th, and 10th circuit courts in two different forms. The first is that, institutions have challenged Title IX regulations as a defense to suits filed by female student-athletes, and in general the courts have repeatedly upheld the

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81 Heller & Odegard, supra note 11.
82 See generally, Tom Farrey, Football Grabs Stronger Hold on Purse Strings, ESPN, Feb. 25, 2003, http://sports.espn.go.com/espn/print?id=1514457&type=story (stating that Kansas State University’s with proportionality is bolstered by its women's sixty-two-member equestrian team and a seventy-four-member rowing team).
83 Dodd, supra note 41.
86 Sec'y of Educ., supra note 70, at 30.
87 Id. at 30-31.
88 Cantu, supra note 78.
89 See Leland & Peters, supra note 70, at 5
regulations. Second, male student-athletes have sued their schools as a result of the elimination of their sport.

[The] National Wrestling Coaches Association (“NWCA”), Committee to Save Bucknell Wrestling (“CSBW”), Marquette Wrestling Club (“MWC”), Yale Wrestling Association (“YWA”), and College Sports Council (“CSC”) are associations representing male intercollegiate and scholastic athletes, coaches, and alumni. They commenced this action for declaratory judgment and injunctive relief to enjoin the U.S. Department of Education (“DoE”) from enforcing Title IX, which prohibits sex discrimination in education, in a manner they contend results in discrimination against male athletes. Specifically, plaintiffs maintain that the Department's current enforcement policies lead educational institutions to cut men's sports teams, artificially limit the number of participants on men's teams, and otherwise impermissibly discriminate against men based on sex in the provision of athletic opportunities, thereby denying male athletes and other interested parties the equal protection of laws.

In addition, some have offered the argument that the Title IX regulations force schools to discriminate against males because of their sex, by cutting male sports to comply with Title IX, their schools violate both Title IX and the equal protection component of the Fifth Amendment. These strategies have been unsuccessful. Since the courts have consistently deferred to the Title IX regulations, any change in Title IX policy likely will have to come through the legislature.

Many of the efforts to reform Title IX in the legislature have focused on football. College football is different from other sports due to its vast roster size, its vast budgetary necessities, and that in some cases, football programs generate enough revenue to fund the rest of the athletic program. Based on this third reason, the earliest proposals to reform Title IX attempted to completely exempt all revenue-producing sports, including football, from the Title IX regulations.

IV. POSSIBLE REMEDIES

a. Exemption for Revenue Producing Sports

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91 Id. See generally Cohen, 101 F.3d 155.
92 Boulahanis v. Bd. of Regents, 198 F.3d 633, 636 (7th Cir. 1999).
93 Nat'l Wrestling Coaches Ass'n, 263 F. Supp. 2d at 84.
94 Boulahanis, 198 F.3d at 639.
One way in which to release the constraints of Title IX on college athletics would be to exempt revenue producing sports, which are sports that produce enough money to fund their own activity. Football and basketball are two sports that generally produce enough revenue to support their own operations, as well as having large amounts of excess money that is put back into the budget. However, currently the rate at which these programs spend is taken into account without regard for the revenues that they produce. Football and basketball consume the majority of men’s total athletic budgets in Division I-A schools, 74%. Logically, it would make sense to eliminate one of these programs; however, ‘cash is king’ and these sports will never be eliminated due to their large revenue production and alumni support.

This was first proposed in the debate over the Education Amendments of 1974. Senator John Tower proposed an amendment to exempt all revenue-producing sports from Title IX as long as the sport could support itself without university funding. Senator Tower’s rationale was that because revenue-producing sports often generate enough income to fund themselves as well as the non-revenue-producing sports in the athletic department, regulating the revenue producers would erode the financial base of the entire athletic program, thereby reducing opportunities for both men and women. This amendment, unfortunately, only passed the Senate, not receiving the support it needed from the House of Representatives in order to become law.

In addition, a sport which produced enough revenue to maintain its own operations would not need to take money from students who receive federal aid and therefore could potentially fall outside the reach of Title IX in that they would not receive federal aid, they would simply benefit from their association to an institution that does, which, according to the Court, does not necessarily amount to enough to trigger Title IX.

b. Further Define and Reinforce the Second Two Prongs

In response to school administrators’ confusion about specific compliance requirements, the OCR should provide “clear, consistent and understandable written guidelines for implementation of Title IX and make every effort to ensure that the guidelines are understood, through a national education effort.” The Commission on Opportunity in Athletics described this possibility in its report in 2002. The courts have given the label “safe harbor” to the

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99 Dodd, supra note 41.
100 120 CONG. REC. 15,322-23 (1974).
101 Id.
102 Id.
105 SEC’Y OF EDUC., supra note 70, at 33.
106 Id. at 24.
substantial proportionality part, however, the Commission suggested that all three parts of the “interests and abilities” test should be safe harbors. This would assist those schools in complying with Title IX as they would be capable of demonstrating compliance through the second or third parts. Currently, if school officials were attempting to comply with the second or third prong, they do not have a definitive defense and they still may be at risk. The Commission believed that adoption of this recommendation would alleviate concerns that compliance with the second and third parts was insufficient to insulate schools from further complaints.

c. Surveying

The Commission came forward with another recommendation, in that the university could continuously survey its population. The Commission suggested that institutions could use such surveys “as a way of (1) demonstrating compliance with the three-part test, (2) allowing schools to accurately predict and reflect men's and women's interest in athletics over time, and (3) stimulating student interest in varsity sports.” It would be recommended that the OCR should set out specific guidelines for school to follow when conducting these surveys, so they could be used to demonstrate compliance with the three parts of the “interests and abilities” requirement.

It is believed that these surveys may loosen the tight hold that Title IX compliance has placed upon collegiate athletic budgeting offices. These surveys have the potential of showing that women’s interest in participating in collegiate athletics is being met, by an amount equal to, if not more than the rate at which men’s interest is met.

V. CONCLUSION

Title IX has come a long way in its goal to provide opportunity for women. The spirit and goal of the law are still a proper and desirable outcome; however, there must be some evolution to the application of Title IX to collegiate athletics.

There is no doubt that the framers nor even proponents of Title IX, who would like to further advance female opportunities in sports, believe that men’s programs or athletes should be harmed. As Arizona State University associate athletic director Dawn Rogers theorized, “[t]hat’s a shortfall of the law. It’s about providing opportunities, not taking away from one group to keep up with another.”

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107 Id.
108 Id. at 39.
109 Id.
110 Id.
111 SEC’Y OF EDUC., supra note 70, at 38, 59.
112 Id. at 38.
113 Id.
114 Kathryn Jean Lopez, Interest Surveys Will Let Secret out on Title IX Women's Sports, PASADENA STAR NEWS, Mar. 27, 2005.
115 Id.
116 Heller & Odegard, supra note 11.
The strains on college athletics must be loosened, in order to ensure that Title IX does not amount to the exact opposite of its intention, denying opportunities to some, while creating a ‘gender-war’. Title IX implementation has reached a pinnacle moment in its value to society. Alumni of institutions will not allow for the revenue producing sports to be eliminated. Young men are being hurt by the elimination of their sport, and even in the most extreme cases, women are being taken advantage of to simply fill a quota like number for the appearance of compliance. Something must be done, and with the Judiciary’s stubbornness to take action, it seems that the legislature or potentially even the Office of Civil rights must take action.
NOONAN V. STAPLES: LIBEL LAW’S SHOCKING NEW PRECEDENT AND WHAT IT MEANS FOR THE MOTION PICTURE INDUSTRY

Lindsee Gendron

I. INTRODUCTION

A writer, still a bit angry at that bully that tortured him throughout his childhood, uses the bully’s name for a character in his new script for a little taste of revenge. The character completely embarrasses himself in an extremely awkward situation, which also just so happens to have happened to that real-life bully years before. The name is real, and the story is true. Now a mild-mannered adult, the former bully is horrified by his portrayal in the movie, as it reminds the world of a time he would prefer to have forgotten forever. Angered, he sues the writer for libel. The claim cannot survive, however, because the story is true. So the writer and his movie are safe, regardless of his motive for including the bully. But what if that claim could survive? The result would be expensive payouts to many emotionally injured parties that could cost the motion picture industry millions. A recent First Circuit precedent is paving the way for exactly this scenario, and the consequences could be disastrous for media defendants.

As traditional case law across the nation, and logic, tell us, truth is an absolute defense to a claim of libel. At least it was until now. The recent First Circuit decision in Noonan v. Staples\(^1\) has the potential to distort libel law and broaden its application beyond the biggest limitation it had ever faced: truth. In interpreting a century-old Massachusetts law, and consequently turning libel law on its head, the First Circuit held that a truthful statement, if said with malice, could be the basis of a libel claim. This dangerous precedent’s disregard for the First Amendment’s protections of free speech could pave the way for disastrous results in a variety of industries that can easily be subjected to lawsuits in Massachusetts. It could be especially harmful to the motion picture industry.

II. A BRIEF INTRODUCTION TO LIBEL LAW\(^2\)

The law of defamation developed early on in American law.\(^3\) It protects an individual’s right to be free to enjoy their reputations unimpaired by false and defamatory attacks.\(^4\) Libel is a

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\(^1\) Noonan v. Staples, Inc., 561 F.3d 4 (1st Cir. 2009).
subset of defamation which involves words that have been published rather than just spoken. As a state law, the elements vary from one state to the next; however, they all tend to share the same general characteristics. Generally, a libel law claim requires (1) a statement published by the defendant (2) about the plaintiff (3) that is false, and (4) damages the plaintiff’s reputation. This publication generally must be accompanied by some level of fault on the part of the defendant, usually negligence for statements regarding a private person and actual malice for a public figure.

Although truth was once considered only a conditional defense to a libel claim, it has become an absolute defense, as this seems to be mandated by the First Amendment and its protection of speech. Both the case law and the commentary surrounding it seem to have taken the idea of truth as an absolute defense completely for granted, as there had been nothing to seriously contradict the idea pre-Noonan v. Staples. Courts that have considered the issue have focused on the important First Amendment considerations and implications of claims based on true statements. These courts have found that truthful statements are protected.

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5 Ravnikar v. Bogojavlensky, 782 N.E.2d 508, 510 (Mass. 2003) (“The statement may be published in writing or some other equivalent medium (in which case it is designated as libel), or, as in this case, orally (in which case it is designated as slander).”).
6 The elements of libel under Massachusetts law are “(1) a false and defamatory communication (2) of and concerning the plaintiff which is (3) published or shown to a third party.” Cornwell v. Dairy Farmers of America, Inc., 369 F. Supp. 2d 87, 110 (D. Mass. 2005) (quoting Dorn v. Astra USA, 975 F. Supp. 388, 396 (D. Mass. 1997)). Under New York law, “[t]he elements are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and, it must either cause special harm or constitute defamation per se.” Dillon v. City of New York, 704 N.Y.S. 2d 1, 5 (N.Y. App. Div. 1999). California statute provides that “[l]ibel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.” CAL. CIV. CODE § 45 (2007). Florida law requires (1) a false statement published by the defendant, (2) about the plaintiff; (3) to a third party; and (4) the falsity of the statement caused injury to the plaintiff.” Border Collie Rescue, Inc. v. Ryan, 418 F. Supp. 2d 1330, 1348 (M.D. Fl. 2006). The restatement of torts provides that, “to create liability for defamation there must be: (a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.” RESTATEMENT (SECOND) OF TORTS § 558 (1977).
7 See Ravnikar, 782 N.E.2d at 510-11.
8 See id.
11 Sullivan, 376 U.S. at 269 (“libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.”).
12 See supra, note 10.
III. NOONAN v. STAPLES

Alan Noonan was a sales director for Staples. His job entailed significant amounts of travel, and thus, significant numbers of expense reports.\(^{13}\) After discovering that another employee was embezzling funds through false expense reports, Staples audited expense reports from a random sampling of North American employees.\(^{14}\) Noonan was a part of that random sampling. The review of Noonan’s expense reports led to the discovery that there were significant differences between the reports and the money he actually spent. Staples discovered that many of the reports contained entries where exactly $100 more than the actual amount spent was claimed and other entries in which the decimal point had been moved two places.\(^{15}\) Thanks to one of these "mistakes," Noonan was reimbursed $1129 for a meal at an airport McDonald’s that actually cost him $11.29. Based on this evidence, the team concluded that Noonan "deliberately falsified" expense reports and Staples terminated him.\(^{16}\)

The day after Noonan’s termination, the Executive Vice President sent out an email to all of the employees in Staples’s North American Division, which includes about 1500 people. The email, which reminded the employees of corporate policies and the availability of their ethics hotline, began with the following announcement: “It is with sincere regret that I must inform you of the termination of Alan Noonan’s employment with Staples. A thorough investigation determined that Alan was not in compliance with out [travel and expenses] policies.”\(^{17}\)

Among other claims, Noonan’s complaint against Staples alleged libel based on this email.\(^{18}\) The district court granted summary judgment for Staples on the libel claim, explaining that what was stated in the e-mail was true.\(^{19}\) While the Circuit Court agreed that the email was truthful, it disagreed with the District Court’s final result. Citing a 107 year-old statute, the court recognized an exception in which truth is not an absolute defense: the libel action may proceed regardless of truth “if the plaintiff can show that the defendant acted with ‘actual malice’ in publishing the statement.”\(^{20}\)

Initial commentary on this shocking new decision is not positive to say the least. Brimming with harsh, cautionary statements such as “it is the most dangerous libel decision in decades...the decision puts a crack in the bedrock that threatens to undermine free speech,” “be afraid -- be very, very afraid -- of this precedent. If ill will is all that is needed to turn a truthful statement into libel, then everyone is a potential defendant,” “the ruling is troubling on so many levels that it beggars the imagination” and “the case threatens to muzzle both news and entertainment media,” none of the commentaries agree with the decision.\(^{21}\) In fact, it seems as if

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\(^{13}\) Noonan v. Staples, Inc., 556 F.3d 20, 23 (1st Cir. 2009).
\(^{14}\) Id.
\(^{15}\) Id.
\(^{16}\) Id.
\(^{17}\) Id.
\(^{18}\) Id. at 24.
\(^{19}\) Id. at 25.
\(^{20}\) Id. at 26; Mass. Gen. Laws ch. 231, § 92.
all who have spoken on the issue are simply waiting for the inevitable overturning of the
decision. And they are likely correct. If this decision is not quickly overturned, its
consequences could be disastrous for media defendants, especially for the motion picture
industry.

IV. IMPACT ON THE MOTION PICTURE INDUSTRY

The Noonan court characterized this exception as “narrow.” However, the court
potentially opened up libel law to a huge number of cases in which the claim never before could
have survived. Truth is still a defense in the other forty nine states, but since one state has
opened that door, plaintiffs from all over the country will attempt to sue in Massachusetts in
order to be compensated for true statements that were said about them. In many cases,
jurisdiction over out of state defendants will be difficult. The same cannot be said of large media
defendants.

Under Keeton v. Hustler Magazine, libel plaintiffs have a particularly easy time showing
that a court has jurisdiction over a libel claim involving a media defendant because they
generally knowingly release their publications in all fifty states. The Court in Keeton held that
the circulation of the magazine throughout the state of New Hampshire was sufficient to show
that Hustler had purposefully directed its actions at the state, thus allowing special jurisdiction.
The Court explained that the plaintiff was seeking damages for a nationwide claim, and that
some of the harm was suffered in New Hampshire: “The communication of the libel may create a
negative reputation among the residents of a jurisdiction where the plaintiff's previous reputation
was, however small, at least unblemished.” Further, the Court found that a state has a
significant interest in exercising jurisdiction over those who commit torts within the state, and
thus a court has a significant interest in exercising jurisdiction over a defendant who has
committed libel and directed it towards the state. Finally, the Court explained that the plaintiff
need not have contacts with the state in order for there to be jurisdiction.

Keeton potentially allows libel plaintiffs to choose the state that has the laws most
favorable to their claims. In the past, the biggest advantage to choosing your venue was a
potentially longer statute of limitations period. With the Noonan precedent, however, the
advantage can become so much more: it can allow plaintiffs the chance to sue based on a true
statement. It is a claim that would fail in every other state, but is now viable in just one. And
with the ease of creating jurisdiction, many potential plaintiffs that have never actually stepped
foot into the state of Massachusetts may be able to prove the validity of their claim there. And

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22 Id.; see also posting of Sam Bayard to Citizen Media Law Project, http://www.citmedia-law.org/blog/2009/sam-bayard/first-circuit-upends-accepted-understanding-truth-defense-defamation-cases (Feb. 17, 2009) (“There’s a chance that the First Circuit will review the decision en banc (that is, with all the judges of the First Circuit hearing the case, rather than three), and the case has stark constitutional implications that make it a good candidate for Supreme Court review”).
25 Id. at 778.
26 Id. at 779. The Court did not see a fairness problem in allowing the plaintiff to choose the jurisdiction that had the longest statute of limitations of any state in the nation, explaining that: “certainly Hustler Magazine, Inc., which chose to enter the New Hampshire market, can be charged with knowledge of its laws and no doubt would have claimed the benefit of them if it had a complaint against a subscriber, distributor, or other commercial partner.”
an easy target would be the motion picture industry, which has pockets deep enough to make the suit worthwhile, and which could easily face claims in any state, as movies are typically distributed, heavily advertised and marketed, and often quite popular, nationwide.

Remember the bully from the introduction? A resident of Alabama, he is suing the studio that released the movie in Massachusetts, where it now doesn’t matter that the writer only used truths so long as he wrote with anger in his heart. The bully has no problem showing that the Massachusetts courts have special jurisdiction, as the studio purposefully directed its actions at the state by distributing and advertising the movie there. Nor does he face major hurdles in proving his claim, as the writer’s claim that he only told the truth is no longer a defense. Movie studios put in this position could face terrible financial consequences: the damages owed to a poor private individual who has had his reputation destroyed in fifty different states by a movie that grossed tens or hundreds of millions of dollars could be astronomical. Therefore, this precedent could be very dangerous to the motion picture industry.

While some cases would likely arise in such a way, the scenario of the angry writer is, while interesting, likely not the primary way that the motion picture industry will be damaged by this decision. Instead, the movies that will suffer the brunt of the damage will likely be documentaries. Documentaries are often made by those who are the most passionate about the subject matter. They have definitive beliefs on the issue and they want their side to win the debate. And as with debate on just about any subject, the members of the two sides are often not the best of friends. Also, often when a documentary tells a story completely unknown to the world, the story focuses on one group or person, while showing the other in quite negative ways. As the documentarian here is likely also passionate, it may not be extremely difficult to show anger and hatred towards the other side. Thus, malice in the use of the truths in a documentary may not be so difficult to prove, and so the cases will likely often survive.

Threats of lawsuits such as these can be extremely damaging to lower cost productions such as documentaries as they cannot afford to absorb such claims. And Noonan v. Staples opens the door to large numbers of libel claims based on truthful statements: any documentary that treats anyone in a less than favorable light could be the basis for a claim. While not every claim will win, simply having to defend meritless claims could likely prove too costly and thus prevent the creation and release of many documentaries. This is clearly not a desirable result, as an important value of our society is the free flow of information and ideas, which creates the debates which spark changes and innovations. The loss of many documentaries for fear of lawsuits will inhibit this free flow of information, as many stories will never be told, and thus many movements will never begin and many changes to the world will never be made.

While the ideal solution is of course to overturn the unthinkable decision in Noonan v. Staples, large media defendants that are likely come under attack may need to seek other solutions while they wait for the Supreme Court to take charge of the situation. Unfortunately, there do not seem to be many options for the studios to steer clear of trouble. Of course the case of the angry writer can be caught early and simply erased from the script; the case of the documentarian is not so simple. The documentarian cannot make his point without using truths to show the weaknesses of the other side. He cannot erase all aspects of the film that may give rise to a lawsuit for fear that there be nothing left to film. Thus, it seems that the only course that may be taken that guarantees protection from such suits would be to refuse to release the movie in Massachusetts.

If the distributor does not market the movie or release it in the state, then it has not purposefully directed its actions at the state, and there can be no special jurisdiction. If there is
no jurisdiction, then the company may not be sued there, and thus is not subject to its laws. Thus, it seems that the only way they may protect themselves is to refuse to release the films in Massachusetts. This approach, however, hardly produces desirable results: the people of the state of Massachusetts will be uninformed on issues of social importance and the documentarian has weakened the effects of his film by limiting its viewership, and thus weakened the film’s effect on his cause.

V. CONCLUSION

*Noonan v. Staples* sets a dangerous precedent. It opens the door for virtually anyone who wants to sue over a bruised ego from anywhere in the country. It creates a huge risk for media defendants who want to present their works in the state of Massachusetts, as this will leave them vulnerable to these lawsuits. The First Circuit’s decision must be overturned on the grounds that it violates the First Amendment, which would be consistent with prior case law on the issue. Leaving this decision intact presents too costly of a situation for media defendants: it could lead to a situation where motion pictures, and all other media, would no longer be released in the state for fear of expensive judgments. This loophole presents so many problems that it cannot be ignored. Truth must remain an absolute defense to libel. *Noonan v. Staples* must be overturned.
CONTEXT, NOT CONTENT: MEDIUM-BASED PRESS CLAUSE RESTRICTIONS ON GOVERNMENT SPEECH IN THE INTERNET AGE

NATHAN MURPHY

I. INTRODUCTION

Less than twenty-four hours after the election of the forty-fourth president of the United States, Barack Obama’s transition team announced the creation of change.gov, a website intended to be the public’s central source for news and announcements about the new administration.1 It was the first of many clear indications that a campaign that had relied heavily on the internet would continue to use the medium as its candidate became a president.2 On March 26, 2009, the president held the White House’s first-ever “online town hall” meeting, answering voters’ questions live over the internet.3 Harnessing non-traditional media outlets—especially internet resources like YouTube, Facebook and Twitter—was a hallmark of the Obama campaign and has been one of the administration’s earliest priorities.4

President Obama has made clear from the outset that he intends to use the power of the internet to bypass traditional media outlets and take his message directly to the people.5 Many commentators have applauded this move as a welcome change, seeing it as a renewed commitment to governmental transparency and an effective way to circumvent the perceived “characterization” of the news by mainstream media.6 But others have voiced concerns.7 One

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4 Rutenberg & Nagourney, supra note 2.
5 Id. See also Sheryl Gay Stolberg, A Rewired Bully Pulpit: Big, Bold and Unproven, N.Y. TIMES, Nov. 23, 2008, at WK4 (discussing the likelihood that President Obama will use the internet as an electronic “Bully Pulpit”); Sutter, supra note 3 (reporting that the Obama administration “sees the [March 26, 2009] online meeting as a chance for the public to have a ‘direct line’ of communication with the White House”). The president’s efforts have not been limited to the internet. For example he recently made headlines as the first sitting president to appear on The Tonight Show, to deliver, in the words of one reporter, “a fireside chat for the flat-screen age.” Alessandra Stanley, Just a Couple of Average Joes Having a Fireside Chat, N.Y. TIMES, Mar. 21, 2009, at C1.
6 See, e.g., Remi Moncel, President Obama’s Open Government: Welcome First Steps, WORLD RESOURCES INSTITUTE, Jan. 23, 2009, http://www.wri.org/stories/2009/01/president-obamas-open-government-welcome-first-steps (contending that, in the new administration, “[t]he internet’s interactive features will be used to better disseminate government information to a wide audience and increase the level of public participation in decision-making”); Rutenberg & Nagourney, supra note 2 (quoting an Obama media strategist’s view that, although historically “the media has been able to draw out a lot of information and characterize it for people,” there is a “growing appetite from people to do it themselves”).
media commentator considers the government’s “own journalism, their own description of
events of the day” potentially troublesome, because “it’s not an independent voice making that
description.”8 Others fear that the government might use the internet “on behalf of only one
point of view,” instead of on behalf of the public.

These mixed reactions are symptomatic of the confused state of the law—and of legal
scholarship—on the issue of government speech. On one hand, communicating with the public
is an essential function of government.9 The government must be able to inform, and may even
seek to persuade, the general population about its policies and activities. But as government
speech becomes more persuasive, it can begin to resemble propaganda, and disseminating
propaganda is beyond the government’s constitutional authority.10 As scholars and judges have
attempted to distinguish between permissible government communication and impermissible
propaganda, two difficult interpretational problems have confronted them. First, drawing a line
between persuasion and propaganda can be a very vexing inquiry. Second, even if a particular
form of government speech seems impermissible, it can be difficult to articulate a constitutional
reason for prohibiting it. And with the advent of the new technologies of the “information age,”
these problems have come into particular relief.

The purpose of this paper is to begin to answer both of those questions. First, the Press
Clause of the First Amendment can be used to restrict some forms of government speech. After
a brief introduction to the issue of government speech in Part II and an overview of the historical
treatment it has received from courts and scholars in Part III, in Part IV this paper explains the
constitutional basis for Press Clause limitations on government speech. The Constitution
established the press as a check on government, so when government speech interferes with the
press’s checking function, that speech is unconstitutional. This argument has been considered in
various forms by other authors.12 But government speech was never squarely addressed by the
United States Supreme Court until its recent decision in Pleasant Grove City, Utah v.
Summum.13 At first blush, Summum’s holding seems to permit nearly unlimited government
speech, unfettered by the Constitution.14 However, that language is overly broad, and Part IV
explains why future courts may be willing to consider a Press Clause limitation to the general
Summum liberties.

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7 E.g. Jimmy Orr, Going Online with Obama: Will He Play Fair?, CHRISTIAN SCI. MONITOR, Mar. 26, 2009,
http://features.csmonitor.com/politics/2009/03/26/going-online-with-obama-will-he-play-fair/ (conceding that “[a]
skeptic might be forgiven for being suspicious” about Obama’s internet overtures “since it is all too easy for White
House press aides to pick and choose from the [public’s] questions and relay softballs to the president”).
8 Rutenberg & Nagourney, supra note 2 (quoting Bill Kovach, chairman of the Committee of Concerned
Journalists).
9 Id.
10 See infra Part II.A–B.
11 See infra Part II.B.
12 See infra note 117 and accompanying text.
14 See infra Part III.B.iii.
But that conclusion leads to a second problem: even those writers who see why the Press Clause limits government speech have not been able to clearly articulate when that limitation should come into effect. In Part V, this paper contends for the first time that Press Clause restrictions on government speech should be based on the physical medium used, and not the content expressed, and explains why, in the hands of government, some media pose greater First Amendment dangers than others. Finally, this paper concludes that the internet is the first mass communication medium whose use by the government raises real constitutional concerns. Our current administration is not engaged in impermissible government speech. However, the day may come when it crosses the line. Accordingly, courts faced with Press Clause challenges to government speech should distinguish * Summun* and consider limiting that speech, especially if it is communicated via the internet.

II. GOVERNMENT SPEECH

A. The Ways Government Speaks

Our government speaks in a host of different ways. To successfully fulfill its role as it defines rights, crafts social programs, manages the economy, taxes, spends and creates laws, government must communicate with the public. Its speech is sometimes indirect: the government’s funding of the National Endowment for the Arts, for instance, carries with it an implicit message that the arts are worthwhile. But when the government’s message is more direct, it can become more controversial.

The government often communicates directly to the public to advocate specific viewpoints. President Theodore Roosevelt was the first to see his office as a “bully pulpit” that allowed him, when he was unsuccessful at getting his way with Congress, to take his case directly to the people. Accordingly, although scholars use the generic label “government speech,” academic discussion has focused almost exclusively on speech by the executive branch, which is often the most aggressive government communicator. For example, during the


18 The government routinely spends money to promulgate a particular message to the public. For example, in 2005 *USA Today* broke the story that the U.S. Department of Education had paid the conservative columnist Armstrong Williams more than $240,000 to promote the No Child Left Behind Act—a critical component of President Bush’s agenda. Greg Toppo, *White House Paid Commentator To Promote Law*, USA TODAY, Jan. 7, 2005, at 1A. For a discussion of the “pay-to-praise” scandal, see generally Jodie Morse, Note, *Managing the News: The History and Constitutionality of the Government Spin Machine*, 81 N.Y.U. L. REV. 843 (2006). The executive branch often
Vietnam War, political and military leaders mounted a campaign to appeal directly to the public and drown out anti-war dissidents’ messages. President Carter’s strategy to fight the Arab oil embargo included communicating a message of conservation to the American public. President Reagan went on television to convince the nation to support the American involvement in Grenada and Lebanon—and to oppose congressional Democrats who were against the military actions. President Clinton tried unsuccessfully to appeal to public opinion and create a sense of crisis to gain support for his health care reform agenda. And President George W. Bush and Vice President Cheney promoted and justified controversial post-9/11 national security programs to the public on dozens of occasions.

While the government has always tried to communicate directly to the public, often to advance a controversial viewpoint, its efforts have intensified in recent years. According to


19 MARK YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA 7 (1983).

20 Id. at 7–8.


22 See Theda Skocpol, From Social Security to Health Security?, 19 J. HEALTH POL’Y & L. 239, 240 (1994) (noting the president’s appeals); Theodore R. Marmor & Jonathan Oberlander, Paths To Universal Health Insurance: Progressive Lessons from the Past for the Future, 2004 U. ILL. L. REV. 205, 230 (describing the “failure of the Clinton plan”). See also GELDERMAN, supra note 17, at 163 (pointing out that, while President Clinton passed 88% of the legislative measures he sent to Congress, the media dwelled on his failures, including his unsuccessful campaign for health care reform).


24 SAMUEL KERNELL, GOING PUBLIC: NEW STRATEGIES OF PRESIDENTIAL LEADERSHIP vii (1986) (noting that “modern presidents routinely appear before the American public on evening television on all kinds of issues ranging from national crises to the commemoration of a presidential library.”); see also Bezanson & Buss, supra note 15, at 1381 (pointing out that “the use of speech by government is expanding and taking new forms, which presents heightened risks that the government may . . . monopolize private speech.”). For a very recent example of President
one study, “the more recent the president, the more often he goes public.” George W. Bush frequently used his “bully pulpit” to personally lobby the electorate on behalf of his education reforms and tax cuts, his new Medicare program, the Iraq war, and “immigration reform.”

One of the primary reasons that President Bush was able to step up these appeals, both in frequency and in intensity, was that he had at his disposal a medium that was just coming of age—the internet. Politically, the internet is a powerful tool, and President Bush was able to use it to influence popular opinion. For example, to promote his tax cuts, he directed the public to his website, www.bushtaxrelief.com. And by searching for old, allegedly pro-invasion quotations and incorporating them into “rapid-response” releases specifically taking aim at


Elena Kagan, Presidential Administration, 114 HARV. L. REV. 2245, 2300 (2001). Another survey by President Clinton’s chief speechwriter found that Clinton spoke, on average, 550 times in public during a given year, compared to 320 for Ronald Reagan and eighty-eight for Harry Truman. Id; see also GELDERMAN, supra note 17, at 8 (observing similar trends). At the beginning of his presidency, some commentators expected George W. Bush to resort less often to public appearances than his predecessor. Corey Cook, The Contemporary Presidency: The Permanence of the “Permanent Campaign”: George W. Bush’s Public Presidency, 32 PRESIDENTIAL STUD. Q. 753, 755–76 (2004), available at http://www3.interscience.wiley.com/cgi-bin/fulltext/118918213/PDFSTART. But instead, at the beginning of his presidency he traveled and appeared in public at least as often as President Clinton—if not more so. See id. at 758 (concluding, based on an empirical study, that “Bush’s first-year domestic travel schedule was remarkably similar in scope to that of Clinton . . . . In fact, Bush was on pace to surpass Clinton’s benchmark number of appearances but dramatically scaled back his travel in the immediate aftermath of September 11.”). Interestingly, as public support for his presidency dropped during his second term, President Bush increased the frequency of his public appeals and solo press conferences. Marsha Joyst Kumar, Managing the News: The Bush Communications Operation, in The Polarized Presidency of George W. Bush, 351, 351–52 (George C. Edwards III & Desmond S. King, eds., 2007).

For a description of President Bush’s efforts on behalf of his tax cuts, see Bush Calls on Public To Lobby Congress, N.Y. TIMES, Apr. 8, 2001, §1, at 1. Regarding Medicare promotion, see Robert Pear, Ruling Says White House’s Medicare Videos Were Illegal, N.Y. TIMES, May 20, 2004, at A24 (noting how the Bush administration distributed ready-made television news segments touting the new program as a “boon to the elderly”). While a GAO report found that the stories were impermissible “covert propaganda,” it had little way to enforce its decision. Id. For more discussion of the GAO as a possible limit on government speech—and why it is inadequate—see infra Part III.A. On the Iraq war, see, e.g., Ron Hutcheson, Bush Tells Nation “Sacrifice Is Worth It,” MIAMI HERALD, June 30, 2005, at 1A (describing the president’s attempts to sell the war). On immigration reform, see Mark Silva, Bush Takes Appeal to Border, CHI. TRIB., May 19, 2006, at News-22.

For analysis of the political power of the internet, see generally Adam Nagourney, Internet Injects Sweeping Change into U.S. Politics, N.Y. TIMES, Apr. 2, 2006, at 1-1 (describing the internet’s power as a political tool), Jose Antonio Vargas, Republicans Seek To Fix Short-Sightedness, WASH. POST, Nov. 25, 2008, at C1 (noting the differential use of the internet between Democrats and Republicans and its likely effect on the presidential election’s outcome). Compare the previous stories with Elisabeth Bumiller, Direct to the People, The Old-Fashioned Way, INT’L HERALD TRIB., Oct. 17, 2005, at News-3 (noting uncertainty as to the impact of President Bush’s Saturday addresses over traditional radio). For more discussion of the internet as a political tool, see infra Part V.B.i–ii.

Bush Calls on Public To Lobby Congress, supra note 26.
individual legislators, the White House used the internet to mount public relations campaigns against anti-war Democrats.29

But if George W. Bush was the first president in the internet age, Barack Obama is unquestionably the first of that age. His has already been called the first “internet presidency,” with reason.30 His campaign used YouTube, instant messaging, and a custom social-networking program based on Facebook to raise money, shape his message and get out the vote.31 Many commentators agree that this use of the internet played a major role in getting him into the White House.32 Democrats generally portray their party as the party of the internet—although evidence of which major party has made better use of the internet is mixed33—but the effectiveness of the Obama’s internet campaign was still especially noteworthy. Between August and November 2008, Obama was mentioned in 500 million blog posts, compared with John McCain’s 150 million mentions, and had 844,927 MySpace friends compared with McCain’s 219,404.34 President Obama’s campaign “Facebooked, Tweeted, texted and YouTubed its way to victory.”35

32 See Andrew Rasiej & Micah L. Sifry, “We” Has Power Over “Me,” POLITICO.COM, Feb. 5, 2009 (contending that “[t]he success of Barack Obama’s campaign has ended once and for all the argument about whether the Internet matters in politics.”); Mitch Wagner, Obama Election Ushering in First Internet Presidency, INFO. WEEK ONLINE, Nov. 5, 2008, http://www.informationweek.com/1209/obama.htm (quoting an industry analyst’s view that there is no doubt that “communication through YouTube and other social networks put him over the top.”).
33 Compare Jeffrey H. Birnbaum, Liberal Praise Drawn from Unlikely Source, WASH. POST, Oct. 18, 2004, at E-1 (quoting a right-wing fundraiser’s view that “left-leaning groups are miles ahead in using the world’s most powerful and efficient marketing tool—the Internet—for political advocacy.”) with 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, 56 (2007) (discussing the 2004 elections, where the internet allowed Senator John Kerry’s campaign to “raise more campaign money” than George W. Bush but that, “despite the fundraising disadvantage, Bush still won because Republicans increased their turnout at the polls more than the Democrats . . . at least in part [resulting] from Bush’s Internet efforts, which included a total e-mail list of 7.5 million names and 1.4 million volunteers.”).
34 Wagner, supra note 30.
35 Stolberg, supra note 5.
Recognizing its power, the president and his supporters have made the persuasive use of the internet a top priority in the new administration.\textsuperscript{36} There are early indications that the president intends to rely heavily on the internet to communicate his message directly to the public.\textsuperscript{37} His ambitions seem very broad. According to an internet-politics pioneer who worked on his campaign, he is expected to use the kind of networking that was so successful during his campaign to “transform the White House as well,” by using the internet to push his legislative initiatives.\textsuperscript{38} The president’s popularity and mastery of the internet may allow him to exert a strong influence over Congress.\textsuperscript{39} Clearly, government’s use of the internet has the potential to radically transform its relationship with the public, and to reshape the political system itself. In the age of the internet, the government is speaking like never before.

B. The Paradox of Government Speech

The preceding examples present what commentators have called the paradox of government speech.\textsuperscript{40} Non-neutral speech by the government is “at once integral to democratic society and potentially subversive of core First Amendment values.”\textsuperscript{41} On one hand, government speech is an essential part of a republican democracy. The executive branch could not successfully govern without the ability to “explain, persuade, coerce, deplore, congratulate, implore, teach, inspire, and defend with words.”\textsuperscript{42} But with the government’s power to communicate comes the power to destroy the bedrock of government by consent, because “the power to teach, inform and lead is also the power to indoctrinate, distort judgment, and perpetuate the current regime.”\textsuperscript{43} Government has consistently sought to control public perceptions and dominate debate, often successfully.\textsuperscript{44} And at some point, legitimate speech by the government can cross the line and become propaganda, which is anathema to government by

\textsuperscript{36} Rutenberg & Nagourney, supra note 2; see also Cillizza, supra note 31 (describing how the Obama administration is seeking to apply its successful internet campaign strategy toward furthering the White House agenda).
\textsuperscript{37} For further discussion of President Obama’s use of the internet, see infra notes 184–197 and accompanying text.
\textsuperscript{38} Wagner, supra note 30.
\textsuperscript{39} Id. (explaining that “Congress will be put between a rock and a hard place if millions of citizens sign up to help the president pass his agenda. . . . If the president says, ‘Here are the members of Congress who stand in the way of us passing health care reform,’ I would not want to be one of those people. You’ll have 10 or 15 million networked Americans barging in on the members of Congress telling them to get in line.”).
\textsuperscript{41} Cole, supra note 40, at 702. For example, Government can foster the rule of law by supporting laws that are enacted. Bezanson & Buss, supra note 15, at 1380. It can also act to enhance public debate, can encourage forms of expression that might not be incentivized by the private sector, and can bring a particular and distinctive point of view to the public debate. Ahner S. Greene, Government of the Good, 53 VAND. L. REV. 1, 8 (2000).
\textsuperscript{42} Bezanson & Buss, supra note 15, at 1380.
\textsuperscript{43} Yudof, supra note 40, at 865.
\textsuperscript{44} Entman, supra note 21, at 66.
the people. The Founding Fathers were suspicious of governmental rhetoric aimed at winning over popular opinion, fearing that oratory might undermine the “rational and enlightened debate” democracy requires. Madison, for example, argued forcefully against a proposed modification to the Virginia state constitution that would have allowed a branch of government to appeal directly to the people to redress constitutional imbalances. This sentiment was rooted in the understanding that the most serious danger of government speech is that it has the potential to undermine “the ability of citizens to think clearly about policy issues and government leaders.”

More than any person or corporation, the government has the resources—and interest—to convince the public to support specific social or governmental policies. Its ability to misuse that power raises grave concerns, because government speech can legitimately threaten the balance of power between itself and the people.

Our tendency is to associate propaganda with totalitarian governments. But past Supreme Court decisions have countenanced the possibility that our government’s expression can be propaganda too. A seminal article on government speech defines propaganda as “the use of facts, fiction, argument and suggestion, sometimes supported by an effort to suppress inconsistent material, with the calculated purpose of instilling in the recipient certain beliefs, prejudices, or convictions” designed to produce a certain course of action. By that measure, we

46 GELDERMAN, supra note 17, at 2–3.
48 Yudof, supra note 40, at 901.
50 Bezanson & Buss, supra note 15, at 1504. See also Entman, supra note 21, at 67 (citing research that demonstrates that the greatest source of power in the “power flows” among the government, the media and the public is the government).
51 See, e.g., Arkansas Educ. Television Com’n v. Forbes, 523 U.S. 666, 688 (1998) (Stevens, J., dissenting) (explaining that “Congress chose a system of private broadcasters licensed and regulated by the Government, partly because of our traditional respect for private enterprise, but more importantly because public ownership created unacceptable risks of governmental censorship and use of the media for propaganda”); Public Utilities Commission v. Pollak, 343 U.S. 451, 466 (1952) (Black, J., concurring) (finding that, in a case that challenged the constitutionality of government-funded broadcasts on streetcars, “subjecting [transit] passengers to the broadcasting of news, public speeches, views, or propaganda of any kind by any means would violate the first amendment”) (emphasis added).
52 Robert D. Kamenshine, The First Amendment’s Implied Political Establishment Clause, 67 Cal. L. Rev. 1104, 1126 n.81 (1979). Black’s Law Dictionary provides a similar definition: “The systematic dissemination of doctrine, rumor, or selected information to promote or injure a particular doctrine, view, or cause.” BLACK’S LAW
see that some of the past actions of our government have quite clearly been propaganda—for instance the Bush administration’s payments to Armstrong Williams. But other types of speech do not seem to raise a problem, like President Carter asking us to conserve energy. It is the cases in between that present the difficult issue of when, exactly, government speech becomes propaganda. And even if government speech is called “propaganda,” how the law should limit it also remains an open question. The next Part describes the various historical attempts to resolve these questions, and reveals why they are no longer adequate.

III. THE RESTRICTION OF GOVERNMENT SPEECH: HISTORICAL PERSPECTIVES

A. The Congress: Legislative Theory

After World War II, at the behest of academics and journalists, Congress began to confront the question of how domestic propaganda—which had been so useful in wartime—could be controlled during peacetime. The 1951 budget contained a provision stipulating that no part of any appropriation in the budget could be used “for publicity or propaganda purposes not heretofore authorized by Congress” and similar prohibitions have been included in every appropriation bill since. But these anti-propaganda provisions have proven to be essentially toothless.

For example, in 1983, House Democrats discovered that the Reagan administration had been paying writers to publish anti-Nicaragua editorials, and referred the matter to the Government Accountability Office (GAO). The GAO found that the activities were essentially “covert propaganda,” but it took no action. Likewise, when the story broke that the Clinton White House had paid networks millions of dollars from the coffers of the Office of National Drug Control Policy to disseminate anti-drug themes on shows such as ER and Beverly Hills 90210, the Republican Congress convened hearings and the matter was referred to the FCC. But although the FCC spoke out against the arrangement, it did not impose any penalties on the broadcasters or the government.

The legislative solution has been inadequate for two reasons. First, the GAO, which is the main body responsible for enforcing the anti-propaganda laws, is poorly suited for the task. Its role is only advisory, so its opinions have no precedential weight or legal enforceability. The most it can do is refer matters to Congress for additional investigation. Second, the GAO
is faced with the challenge identified earlier—determining the definition of “propaganda”—but the agency charged with drawing the line around government propaganda has publicly stated that it does not know where that line is.61

Recognizing the fact that inadequate statutory prohibitions were partly to blame for the Armstrong Williams scandal during the Bush administration, where reporters discovered that the White House was paying a radio personality to promote the president’s policies,62 Democrats in both the House and the Senate introduced legislation in 2005 designed to more actively curb government propaganda.63 The House version died in committee.64 A weakened Senate version made it out of committee, but never came to a vote.65 But even if it had passed—which at the time was considered unlikely—many commentators felt that it would not have had a meaningful effect on government speech.66 The unsuccessful 2005 bills are merely another chapter in the long “historical failure” of legislative checks on government propaganda.67 In light of this history, placing faith in legislative intervention to define and check abusive government expression seems unwise. Instead, we must look to the Constitution.

B. The Judiciary: Constitutional Theory

Because of the absence of legislative provisions regarding government speech, the Supreme Court has turned to the First Amendment. The Court’s responses have been “occasionally bold, but rarely pretty.”68 Government speech cases have been called the “ugly stepchild” of First Amendment jurisprudence.69 Indeed, the fact that the Constitution does not place any explicit limitations on government speech has made constitutional principles difficult to develop, and the confused guidance from the Supreme Court, which this section examines,

62 Supra note 18.
63 Williams agreed to return a portion of the money, Armstrong Williams Agrees To Return $34,000, PR WEEK, Oct. 30, 2006, at 2, and the FCC levied fines against some of the stations who broadcast Williams’ plugs, Clay Calvert, What Is News?: The FCC and the New Battle over the Regulation of Video News Releases, 16 COMMLAW CONSPECTUS 361, 365–66 (2008), but no action was brought against government actors.
66 See Morse, supra note 18, at 864 (contending that, in the face of vigorous objections from lobbyists and the press, “there is little chance” the reforms would succeed); see also Pollack, supra note 18, at 1486 (calling the bill’s remedies “inadequate”); Janel Alania, Note, The “News” from the Feed Looks like News Indeed: On Video News Releases, the FCC, and the Shortage of Truth in the Truth in Broadcasting Act of 2005, 24 CARDOZO ARTS & ENT. L.J. 229, 231 (2006) (arguing that “it is difficult to see how the proposed Truth in Broadcasting Act will make a substantial difference in the type and quality of news the American public sees.”).
67 Morse, supra note 18, at 863. See also Pollack, supra note 18, at 1485–85 (noting the “minimal” legislative responses to improper government speech).
68 Bezanson & Buss, supra note 15, at 1381.
suggests that the Court has not yet formulated a clear constitutional theory of government speech.  

i. Government as a First Amendment Right-Holder

A threshold issue in government speech analysis is whether the government is a protected speaker under the First Amendment. If it is, it would have a right to speak equal to any other private citizen, and further analysis of constitutional restrictions would be futile. But the prevailing view is that government expression is not included within the First Amendment’s protections.  

Because the First Amendment has historically served to limit government, and not to protect it, Professor Mark Yudof, a pioneer of government speech scholarship, notes that interpreting the First Amendment to affirmatively protect government’s right to speak “would be a grave error.”  

Reading a First Amendment recognition of government’s freedom to speak is to “turn the Constitution upside-down.” Hence, because government does not have an unchecked right to speak, there may be at least some theoretical situations in which its speech can be restricted.

ii. The First Amendment’s Restrictions on Government Speech—Scholarly and Judicial Views

Whether the First Amendment places limits on government speech, however, is a far more difficult question, and it has correspondingly generated more controversy among

70 See Pleasant Grove City, Utah v. Summum, 129 S. Ct. 1125, 1139 (2009) (Stevens, J., concurring) (“To date, our decisions relying on the recently minted government speech doctrine to uphold government action have been few and, in my view, of doubtful merit.”); see also Kathryn Elizabeth Komp, Note, Unincorporated, Unprotected: Religion in an Established State, 58 VAND. L. REV. 301, 328 (2005) (contending that “guidance from the Court has not been readily forthcoming”); Caroline Mala Corbin, Mixed Speech: When Speech Is Both Private and Governmental, 83 N.Y.U. L. REV. 605, 611–12 (2008) (noting the recent development of government speech doctrine and its corresponding imprecision).


While most scholars have concluded that the First Amendment does not protect the government, the most thorough treatment of the topic to date recommends granting a limited amount of protection. See generally Fagundes, supra note 71, at 1641 (proposing an analytical framework for determining whether government speech is protected).

72 Columbia Broadcasting System, Inc. v. Democratic Nat. Comm., 412 U.S. 94, 139 (1973) (Stewart, J., concurring) (asserting that “[t]he First Amendment protects the press from government interference; it confers no analogous protection on the Government.”); Yudof, supra note 40, at 867; Fagundes, supra note 71, at 1638 (explaining that “the Speech Clause is typically seen as a bulwark of protection against—rather than a source of rights for—government.”).

73 Yudof, supra note 40, at 871.

74 Bezanson & Buss, supra note 15, at 1504.
academics. To the extent that a consensus has formed on the issue, it appears that scholars find no explicit restriction on government speech in the First Amendment, so that any limitations are passive, implied by the First Amendment’s protections—in particular by the Press Clause.

Speech and press freedoms were constitutionally protected to ensure the “unfettered interchange” of ideas throughout society. But these protections are more than a mere commitment to free expression and communication “for their own sakes.” Instead, the Constitution plays a structural role in our system of self-government, ensuring the free discussion of government affairs, including candidates, policies and political processes. According to some scholars, freedom of the press and of speech in First Amendment protect these democratic values for two distinct reasons. The first, which Professor Vincent Blasi calls the marketplace-of-ideas function, aims to promote “the search for truth” among the populace in order to encourage “autonomous decisionmaking by citizens.” Both a free press and individual free speech preserve this value.

But the First Amendment also serves a second political function—“checking the abuse of power by public officials.” In practice, this role is most often fulfilled by the press when it provides the public with information it otherwise would not have about the government’s activities. Because of the complexity and rapidity with which modern American government makes decisions, timely reporting that provides context and criticism of the current administration’s policies is an essential precondition for modern democracy. When the

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77 Id; see also Sullivan, 376 U.S. at 269 (explaining that the interchange of ideas receives the First Amendment protection necessary for bringing about “political and social changes desired by the people.”).
78 Mills v. State of Ala., 384 U.S. 214, 218–19 (1966); see also FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 81–86 (1982) (explaining that First Amendment protections in the Constitution are largely grounded in the understanding that political leaders are fallible, and in a general distrust of the power of government); Yudof, supra note 40, at 867 (noting that the First Amendment was designed to provide important limitations on government’s interference with political discussion and decisionmaking).
79 See Vincent Blasi, The Checking Value in First Amendment Theory, 1977 AM. B. FOUND. RES. J. 521, 538 (expounding the “marketplace of ideas” concept); Morse, supra note 18, at 864 (interpreting Professor Blasi’s theory using the quoted language).
80 Frederick Mark Gedicks, A Two-Track Theory of the Establishment Clause, 43 B.C. L. REV. 1071, 1080 (2002) (quoting JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 93–94, 112 (1980)) (arguing that the Speech, Press, Assembly, and Petition Clauses serve the “central function of assuring an open political dialogue and process” and “were centrally intended to help make our government processes work, to ensure the open and informed discussion of political issues, and to check our government when it gets out of bounds.”); see also, e.g., THOMAS L. EMERSON, THE SYSTEM OF FREE EXPRESSION 6–9 (1970) (explaining that “freedom of expression is essential to provide for participation in decision making by all members of society,” especially in the context of political expression); Andrew E. Taslitz, Slaves No More!: The Implications of the Informed Citizen Ideal for Discovery Before Fourth Amendment Suppression Hearings, 15 GA. ST. U. L. REV. 709, 713 (1999) (contending that “First Amendment protections of free speech, press, and religion enable ordinary citizens, publishers, and clergy to disseminate and debate the wisdom of various Governmental actions.”).
81 Blasi, supra note 79, at 527.
82 Entman, supra note 21, at 70.
government speaks to the public directly, it can communicate the message it wants, but when its message goes out through the press, journalists and editors can add their own viewpoints, allowing listeners to consider, question, and possibly oppose the government’s account of its own activities. Accordingly, members of the Washington press corps often consider themselves “the permanent in-house critics of government.”

Many First Amendment scholars see this dynamic—where a free and independent press, rather than the freedom of individual speech, is the primary check on government speech—as what the Framers of the Constitution intended. There is still scholarly disagreement about whether the Press and Free Speech clauses protect distinct rights or instead form one coextensive protection of expression. And in the past, the United States Supreme Court has declined some efforts to attribute to the Press Clause a special meaning distinct from the Free Speech Clause.

83 Nowak, supra note 49, at 41.
84 KERNELL, supra note 24, at 76 (quoting a senior Washington correspondent).
85 E.g., David A. Anderson, The Origins of the Press Clause, 30 UCLA L. REV. 455, 533–34 (1983); see also Potter Stewart, “Or of the Press,” 26 HASTINGS L.J. 631, 631, 633 (1975) (expounding his thesis that the role the American press played in the Watergate scandal is “precisely the function it was intended to perform by those who wrote the First Amendment” and distinguishing the Press Clause—a “structural provision”—from freedom of speech, which protects the rights of individuals).
But, although the Supreme Court has never addressed the issue directly, some of its more recent decisions have implicitly acknowledged that the Press Clause and Free Speech Clause protect different activities.88 Viewing the Press Clause as according distinct guarantees is the most logically consistent approach to constitutional interpretation. Justice Stewart famously said that “[i]f the Free Press guarantee meant no more than the freedom of expression, it would have been a constitutional redundancy.”89 Unlike free speech, the press can subject government to “extensive public scrutiny,” and thereby bring governmental corruption and abuse of power into the open.90 In fact, the press is viewed by many as the “fourth estate” of government, whose role is to check the activities of the three branches.91 Most individual citizens “either cannot, or choose not to, compete in public debates dominated by the press and the government,”92 so it is “only the mass dissemination of information can truly check governmental abuses of power.”93 Thus, for the purposes of “checking government power, speech was an afterthought, if it was viewed as serving that function at all; the press was expected to be the primary source of restraint.”94

88 Jon Paul Dilts, The Press Clause and Press Behavior: Revisiting the Implications of Citizenship, 7 COMM. L. & POL’Y 25, 27 (2002). In Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue, the Court struck down, on First Amendment grounds, a tax that singled out the press because “differential treatment, unless justified by some special characteristic of the press . . . is presumptively unconstitutional.” Minneapolis Star and Tribune Co. v. Minnesota Com’r of Revenue, 460 U.S. 575, 585, 591 (1983). More recently, in McConnell v. Federal Election Commission, the Court upheld a statute that regulated political expression by corporations but exempted media corporations, saying that the press-only exception was “wholly consistent with First Amendment principles.” McConnell v. Federal Election Com’n, 540 U.S. 93, 208–09 (2003). In its most recent government-speech decision, Pleasant Grove City, Utah v. Summum, 129 S. Ct. 1125, 1139 (2009), the Supreme Court discussed the First Amendment generally, the Free Speech Clause and the Establishment Clause but did not mention the Press Clause—perhaps implicitly acknowledging that applying the latter to the facts of Summum would lead to a different result. See generally Part IV. A infra (discussing the Press Clause implications of the Summum decision).

89 Stewart, supra note 85, at 633.
90 Sheppard v. Maxwell, 384 U.S. 333, 350 (1966). The Supreme Court has also called the press the “watchdog of government activity,” saying that a “basic assumption of our political system” is that the press serves “as an important restraint on government.” Leathers v. Medlock, 499 U.S. 439, 446–47 (1991). See also Jonathan Mermin, Free but Not Independent: The Real First Amendment Issue for the Press, 39 U.S.F. L. REV. 929, 953 (2005) (describing the press’s role exposing government corruption); Bezanson & Buss, supra note 15, at 1504 (explaining that the very purpose of the Press Clause is “to confine and limit government in order to preserve individual liberty”). But see Entman, supra note 21, at 67 (arguing that, when officials speak in harmony about a particular event or issue, “the media tend to mirror the dominant line”).
91 See, e.g., Stewart, supra note 85, at 634 (“The primary purpose of the constitutional guarantee of a free press was . . . to create a fourth institution outside the Government as an additional check on the three official branches.”). According to a leading First Amendment scholar, there is an implied separation of powers principle in the Press Clause that is analogous to the explicit principles separating the three branches of government. Nowak, supra note 49, at 12. That separation protects the press’s ability to perform its watchdog function beyond the reach of governmental control. Id.
93 Nowak, supra note 49, at 14.
94 Anderson, supra note 85, at 533–34. See also C. EDWIN BAKER, ADVERTISING AND A DEMOCRATIC PRESS 1998 (1994) (explaining that, while free speech is a fundamental personal right, constitutional press freedoms protect an
While the Speech Clause protects individuals’ ability to exercise their democratic responsibilities, it is the Press Clause that keeps government from abusing theirs.

Accepting the view that the Press Clause was intended as a check on government implies some First Amendment limitations on government speech. However, these restrictions are indirect, countenancing a press corps that is sufficiently strong and independent to provide the public with its own version of the government’s story. That passive protection is the extent of the limitations most scholars find in the First Amendment. The general view is that there is no safety net—i.e., no active prohibition on how the government can speak. Commentators have assumed that the press will be powerful enough to perform its checking function, and have concluded that those protections are sufficient.\(^9\) This has led to the conclusion that the Constitution does not impose any restriction whatsoever on most forms of government speech, and that the government has “virtually boundless discretion to say what it wishes.”\(^10\) In the words of one scholar, “[w]hen government misuses its power to communicate we do have a problem, but this does not mean that we have a First Amendment problem.”\(^11\)

iii. Judicial Development of the “Government Speech” Doctrine

This view has become embodied in current Supreme Court jurisprudence through the development of the so-called “government speech doctrine.” The doctrine’s root was *Rust v. Sullivan*, which contemplated whether the government could constitutionally prohibit doctors working in federally-funded family planning clinics from providing advice about abortion.\(^12\) The Court held that the restriction was permissible because, unlike private speakers, the doctors in *Rust* spoke for the government and “when the Government appropriates public funds to establish a program it is entitled to define the limits of that program.”\(^13\) Whatever that language stands for, it does not seem to grant unlimited speech rights to the government. Nevertheless, it marks the humble beginnings of a doctrine which eventually has become much more expansive.

For more than a decade, the Court reached several government-speech decisions that were no broader than *Rust*. In *Rosenberger v. Rector and Visitors of University of Virginia*, the

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\(^9\) See Yudof, *supra* note 40, at 897–906 (considering and rejecting the possibility of direct First Amendment limitations on government speech).

\(^10\) Note, *supra* note 69, at 2412; see also Greene, *supra* note 41, at 4 (declaring that the Constitution generally “imposes no hurdle to government speech, even speech that backs a specific viewpoint in a matter of current social interest.”); Jay Alan Sekulow & Erik M. Zimmerman, Pleasant Grove City V. Summum: Upholding the Government’s Authority To Craft its Own Message Through Privately Donated or Funded Monuments, Memorials, and Artwork, 3 CHARLESTON L. REV. 175, 187 (2009) (summarizing the current state of the law: “When the government restricts private expression, a variety of constitutional free speech protections are triggered. If the government is itself the speaker, however, it generally can select the precise message it wants to deliver.”); Pollack, *supra* note 18, at 1466 (referring to “the government’s almost unbounded entitlement to choose its own speech”).

\(^11\) Schauer, *supra* note 16, at 385; see also Note, *supra* note 69, at 2411 (summarizing the current doctrine’s position that “whatever limitations exist on government speech, they are not to be found in the First Amendment.”).


\(^13\) Id. at 194.
Court held that a university’s refusal to fund a student-run Christian newspaper was unconstitutional viewpoint discrimination. In dicta, however, *Rosenberger* redefined *Rust* as a formal test: the government cannot compel private speech, but if it is using a private speaker to promulgate a government message, it is “entitled to say what it wishes.” Importantly, though, that interpretation of *Rust* was limited to situations where the government “appropriates public funds to promote a particular policy of its own.” In *Board of Regents of University of Wisconsin System v. Southworth*, students at the University of Wisconsin challenged a mandatory student activity fee used to support student organizations whose viewpoints they found objectionable. Reversing the lower courts, the Supreme Court allowed the fee. Again, however, because it held that this was not government speech, the Court did not extend *Rust*.

In *Legal Services Corp. v. Velazquez*, the Court considered the constitutionality of a statute that prohibited funding from the Legal Services Corporation, a federally-funded legal aid program, to be used for the representation of clients who aimed to challenge the existing welfare law. Although, like *Rust*, it involved a compelled-speech challenge, the Court held the restriction unconstitutional, because it judged the speech at issue—the LSC attorneys’ advocacy—to be private speech and thus distinguishable from *Rust*. In the process, however, the Court reaffirmed *Rust*’s permissive treatment of government speech. Finally, in *Johanns v. Livestock Marketing Association*, the Supreme Court considered beef producers’ challenge of a federal law that required them to pay an assessment which funded advertisements promoting beef. The Supreme Court vacated the Eighth Circuit’s ruling and held that “Citizens may challenge compelled support of private speech, but have no First Amendment right not to fund government speech.” But while the Court broadly framed the issue to be “whether the generic

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101 See *Rosenberger*, 515 U.S. at 832–36 (making the distinction between government speech and private speech); see also, e.g., *Griffin v. Sec’y of Veterans Affairs*, 288 F.3d 1309, 1324–25 (Fed. Cir. 2002) (interpreting *Rosenberger*).
102 *Rosenberger*, 515 U.S. at 833.
104 *Southworth*, 529 U.S. at 221 (holding that the “First Amendment permits a public university to charge its students an activity fee used to fund a program to facilitate extracurricular student speech if the program is viewpoint neutral.”).
105 *Id.* at 299 (explaining that “[w]here the University speaks, either in its own name through its regents or officers . . . the analysis likely would be altogether different,” and accordingly explicitly declining to “reach the question whether traditional political controls to ensure responsible government action would be sufficient to overcome First Amendment objections and to allow the challenged program under the principle that the government can speak for itself”).
107 *Id.* at 542–43.
108 *Id.* at 541 (internal citations omitted) (explaining that “viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker, or instances, like *Rust*, in which the government used private speakers to transmit specific information pertaining to its own program.”).
110 *Id.* at 562, 567 (emphasis added).
advertising at issue is the Government’s own speech and therefore is exempt from First Amendment scrutiny,” its actual holding, which only applied the exemption to compelled-funding situations, was much narrower.

Thus, Rosenberger, Southworth, Velazquez and Johanns all reached limited holdings. Language in these decisions indicating that government is entitled to say what it wants is therefore necessarily dictum. But these dicta have provided a springboard for lower courts to steadily begin expanding Rust’s permissive government speech doctrine beyond compelled-funding and compelled-speech cases. Between 2002 and 2008, all but one circuit offered the chance to expand government speech using Rust’s dicta chose to do so. And in its most recent government-speech decision, the Supreme Court follows that majority and grants government speech broad exemptions from First Amendment challenges.

In Pleasant Grove City, Utah, v. Summun, the plaintiff, a religious organization, had written Pleasant Grove’s mayor twice to request permission to build a stone monument containing “the Seven Aphorisms of SUMMUM.” Although this was neither a compelled-speech nor a compelled-funding case, the Court considered it under the following rule:

If petitioners [the city and mayor] were engaging in their own expressive conduct, then the Free Speech Clause has no application. The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech. A government entity has the right to speak for itself. It is entitled to say what it wishes, and to select the views that it wants to express.

Applying its rule, the Court held that the City’s refusal to accept the monument was government speech, and therefore entirely exempt from First Amendment scrutiny. Just like the lower courts, the Supreme Court cobbled together dicta from Southworth, Rosenberger and Rust along

\[\text{footnotes}\]

\[\text{111}\] In 2002, the Federal Circuit held that “the government is entitled to full control over its own speech without violating the First Amendment, whether it speaks with its own voice or enlists private parties to convey its message, and the remedy for dissatisfaction with its choices is political rather than judicial.” Griffin v. Sec’y of Veterans Affairs, 288 F.3d 1309, 1324–25 (Fed. Cir. 2002). In 2005, the D.C. Circuit held that the “First Amendment’s free speech clause does not limit the government as speaker,” People for the Ethical Treatment of Animals, Inc. v. Gittens, 414 F.3d 23, 28 (D.C. Cir. 2005), and again in 2007 that “[v]iewpoint discrimination raises no First Amendment concerns when the government is speaking,” DKT Intern., Inc. v. U.S. Agency for Intern. Dev., 477 F.3d 758, 763 n.5 (D.C. Cir. 2007). In 2008, the Fourth Circuit held that “Government’s own speech . . . is exempt from First Amendment scrutiny,” Page v. Lexington County Sch. Dist. One, 531 F.3d 275, 280 (4th Cir. 2008), and the Seventh Circuit held that “when the government speaks, it is entitled to say what it wishes . . . [a]ccordingly, when the government is the speaker, it may choose what to say and what not to say; it need not be neutral,” Choose Life Ill., Inc. v. White, 547 F.3d 853, 859 (7th Cir. 2008). The Ninth Circuit stood alone in opposition to the expansionary trend in holding that “[t]he First Amendment may limit government speech that makes private speech difficult or impossible or that attributes a government message to a private speaker.” Caruso v. Yamhill County, 422 F.3d 848, 855 (9th Cir. 2005).


\[\text{113}\] *Id.* at 1131 (internal quotations and citations omitted).

\[\text{114}\] *Id.*
with a much narrower holding in *Johanns* to create a vastly expanded government speech
d doctrine, under which government’s right to speak is nearly unlimited. Justice Stevens’s claim
that “[t]he Court’s opinion in this case signals no expansion of [government speech] doctrine” is
either misguided or disingenuous. Supra represents the first time the Supreme Court has
adopted such an expansive view of government speech.

Thus, the status quo, as understood both by scholars and judges is that, while the checks
on government guaranteed by the First Amendment’s freedoms may implicitly limit the
government’s expression, the Constitution does not actively restrict what the government can
say. Instead, the government apparently has virtually limitless authority to communicate its
message, which must be tested in the “marketplace of ideas” that the Free Speech and Free Press
Clauses create. However, there are several reasons to believe that this understanding of the
government’s right to speak is far too expansive—and too simplistic.

IV. THE CONSTITUTIONAL BASIS FOR AFFIRMATIVE RESTRICTIONS OF GOVERNMENT SPEECH

Constitutional scholarship and, more recently, judicial decisions have roundly disclaimed
the idea of affirmative First Amendment restrictions on government expression, instead finding
that government is entitled to say “what it wishes,” unfettered by the First Amendment. At
first glance, the multiplicity of sources espousing this viewpoint would seem to validate its
soundness, but their concordance belies two theoretical shortcomings. First, the view is based on
a misapplication of the Court’s holding in *Rust* and subsequent cases. In reality, the principle
that government can say what it wants is best seen as a shorthand that masks a much more
complicated, and possibly nuanced, view of the relationship between the First Amendment and
government expression. Second, and more importantly for this discussion, the view that
government can say what it wants is premised on the assumption of a press powerful enough to
contradict it. For reasons we will see below, that view is becoming increasingly questionable,
suggesting that it may be time to revise the post-*Rust* expansion of the “government speech”
doctrine. And dictum in the Supreme Court’s most recent government speech decision, *Pleasant
Grove City, Utah v. Summum*, suggests that in future cases, the Court may be willing to do so by
recognizing a Press Clause limitation on the otherwise expansive government speech doctrine.

A. *Summum* Does Not Preclude Press Clause Challenges to Government Expression

Because of the press’s constitutional purpose as the government’s watchdog, it is
relatively straightforward to argue that government speech should be limited when it impedes
that role. The press’s constitutional role is to provide the public with another perspective on

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115 See id. at 1139 (Stevens, J., concurring) (contending that the Court’s decision was based on precedent).
116 E.g., Choose Life III, 547 F.3d at 859; Greene, supra note 41, at 68–69.
117 For discussion of the press’s watchdog role, see supra notes 81–93 and accompanying text. This argument has
been propounded by some First Amendment scholars, such as Professor Nowak. Supra note 49, at 11 (concluding
that “the press clause limits . . . government mass communications.”). Other scholars have suggested this
conclusion obliquely. See Yudof, supra note 40, at 897 (noting possible First Amendment justifications for limits
the government’s activities, one which may be different from the official version of events.\textsuperscript{118} Without a strong press, that opposing viewpoint will be missing, and the First Amendment’s “interrelated goals of a robust public debate, an autonomous citizenry, and informed self-government would be significantly compromised.”\textsuperscript{119} However, as intuitively appealing as this construction of the Press Clause might be,\textsuperscript{120} the Supreme Court’s expansion of the government speech doctrine in \textit{Summum} seriously jeopardizes its applicability. The Court’s view that “[t]he Government’s own speech is exempt from First Amendment scrutiny”\textsuperscript{121} and that “Government is not restrained by the First Amendment from controlling its own expression” might seem to definitively preclude any Press Clause restrictions on government speech.\textsuperscript{122} However, the Court may have spoken too broadly. While \textit{Summum} closed the door on Speech Clause challenges to government speech, it opened a window for the Press Clause.\textsuperscript{123}

Indeed, despite the Court’s broad language, \textit{Summum}’s holding reveals quite clearly that the decision was based on the Free Speech Clause, and not the Press Clause or the First Amendment as a whole. Members of the Summum organization claimed that the city’s speech violated their individual right to \textit{free speech}, and not any right asserted as members of the press.\textsuperscript{124} And while some of the Court’s opinion appears to indicate that the government’s “right to speak for itself” is entirely exempt from First Amendment scrutiny, in the very same paragraph states that “the \textit{Free Speech Clause}”—not the whole amendment—“does not regulate government speech.”\textsuperscript{125} In fact, the opinion later states that its holding “does not mean that there are no restraints on government speech,” specifically insisting that “government speech must comport with the Establishment Clause.”\textsuperscript{126} If the Establishment Clause, which is part of the First Amendment, is a viable restriction on government speech, then \textit{Summum}’s broad government speech rights cannot be based on the entire amendment. Unfortunately, while \textit{Summum} discussed the Free Speech and Establishment clauses, it remained silent regarding the Press Clause.\textsuperscript{127} The question of how the Court is likely to rule if faced with a challenge that particular government speech impinges on the \textit{press}’s right to unfettered expression in violation of the Constitution remains open.

\textsuperscript{118} \textit{Supra} notes 89–93 and accompanying text.
\textsuperscript{119} See Yudof, \textit{supra} note 40, at 898 (noting the “persuasive appeal” of this analytical approach).
\textsuperscript{121} Id. (quoting Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm., 412 U.S. 94, 139, n. 7 (1973) (Stewart, J., concurring)).
\textsuperscript{122} For a discussion of \textit{Summum}’s holding, see \textit{supra} notes 112–115 and accompanying text.
\textsuperscript{123} \textit{Summum}, 129 S. Ct. at 1129, 1131.
\textsuperscript{124} Id. (emphasis added).
\textsuperscript{125} Id.
\textsuperscript{126} Id.
\textsuperscript{127} One suspects that the Court wanted to avoid the controversial issue of the circumstances in which the Press and Free Speech Clauses protect different rights discussed \textit{supra} in notes 81–93 and accompanying text.
B. *Courts May Consider Press Clause Limitations Differently*

The dicta and concurrences in *Summum* indicate that the Court might be amenable to a special exception to its broad government speech doctrine when that speech interferes with the press. First, individual justices’ concurrences indicate a desire to keep the holding in *Summum* limited. For example, Justice Stevens notes that “even if the Free Speech Clause neither restricts nor protects government speech, government speakers are bound by the Constitution’s other proscriptions, including those supplied by the Establishment and Equal Protection Clauses” and that “these constitutional safeguards ensure that the effect of today’s decision will be limited.”

The most informative concurrence may be Justice Breyer’s, which was based on his view that the formalistic government speech doctrine could lead to perverse results. He suggested asking “whether a government action burdens speech disproportionately in light of the action’s tendency to further a legitimate government objective.” Under this standard, the Court might very well follow the Ninth Circuit’s lead and find that the Press Clause limits “government speech that makes private speech difficult or impossible”—in other words, that most applications in which the government’s non-neutral speech displaces the media would be unconstitutional. But no matter which way the Court were to decide a future case, the holding, dicta and concurrences in *Summum* reveal that the Supreme Court’s confused government speech jurisprudence has not yet precluded such speech from being challenged on Press Clause grounds.

If the Press Clause provides a First Amendment basis for *actively* limiting government speech, that basis is undisturbed by the holding in *Summum*. The next section considers whether such a basis exists.

C. *Courts Should Consider Press Clause Limitations Differently*

A primary purpose of the Press Clause was to establish a free, independent press to provide a check on government speech. Assuming that the government respects that freedom, the thinking goes, the press will be able to perform its checking function by acting as an independent speaker in the marketplace. In other words, the government can speak as it

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128. *Summum*, 129 S. Ct. at 1139 (2009) (Stevens, J., concurring); see also id. at 1141 (Souter, J., concurring) (contending that, “because the government speech doctrine . . . is ‘recently minted,’ it would do well for us to go slow in setting its bounds.”).

129. See id. at 1140 (Breyer, J., concurring) (declaring that, in his view, “courts must apply categories such as ‘government speech,’ ‘public forums,’ ‘limited public forums,’ and ‘nonpublic forums’ with an eye towards their purpose—lest we turn ‘free speech’ doctrine into a jurisprudence of labels” and hence “we must sometimes look beyond an initial categorization.”).

130. Id.


132. For a discussion of the confused state of government speech doctrine, both in the courts and among scholars, see *Supra* Part III.

133. *Supra* notes 81–93 and accompanying text.
wishes, because its viewpoint will be tested by the press in the marketplace of ideas.\textsuperscript{134} This is
the indirect restriction many scholars agree is in the Constitution.\textsuperscript{135} But a fundamental
assumption of this line of thought is that the press will always be able to speak loudly enough to
counter the government’s version of events.

However, the media industry is in the midst of massive technological and economic
changes, and those changes are fundamentally calling into question whether the media is—or
will remain—strong enough to counter the government’s voice in the marketplace. We will
explore these changes in detail later,\textsuperscript{136} but for the moment we can consider the question
theoretically. If, \textit{arguendo}, the assumption that the media can speak loudly enough to counter
the government’s communication is false, the view of limitless government speech under the
First Amendment becomes untenable.

Writers have noted several problems that government speech has the potential to raise.\textsuperscript{137}
Of those dangers, the one that most clearly implicates the media is the possibility that
government can speak in such a way as to drown out the voices of the media in the
marketplace.\textsuperscript{138} Indeed, even as a “mass communicator,” it is difficult to see how the
government’s own speech could limit the speech of \textit{individuals}. But it can limit the effectiveness
of the press’s speech.\textsuperscript{139} Thus, it is much more likely that government speech would impinge on
the press’s right than on individuals’ rights.

Despite the presence of the First Amendment, it is possible—at least in theory—for
government’s communication to exert such strong control over the press that it will have
difficulty disseminating sufficient information to keep the government accountable.\textsuperscript{140} The
government expends significant money and effort to promote its own viewpoints, so that
opposing speakers often operate at a disadvantage.\textsuperscript{141} Hence, a government does not need to
directly curtail the activities of private media outlets “if it can effectively displace them by

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\textsuperscript{134} See Nowak, \textit{supra} note 49, at 5 (stating that “the most important reason why we have not had to confront a
serious danger regarding propaganda is the existence of the private sector mass media . . . which has acted as a
countervailing force to governmental speech.”).
\textsuperscript{135} See \textit{supra} notes 81–93 and accompanying text (discussing the view that the Press Clause only passively limits
government speech).
\textsuperscript{136} \textit{Infra} Part IV.B.
\textsuperscript{137} See, \textit{e.g.}, Bezanson & Buss, \textit{supra} note 15, at 1488–96 (describing problems of monopoly, deception and
distortion, and attribution); Delgado, \textit{supra} note 71, at 990 (noting concerns of “‘drowning out’, falsification of
consent, and self-perpetuation”).
\textsuperscript{138} See \textit{The Supreme Court, 1986 Term—Leading Cases, supra} note 45, at 210 (contending that government speech
can “drown out competing views”).
\textsuperscript{139} See \textit{infra} notes 217–220 and accompanying text.
\textsuperscript{140} Entman, \textit{supra} note 21, at 66. \textit{Cf.} Komp, \textit{supra} note 70, at 328 (contending that issues surrounding the
government speech doctrine raise “questions as to what happens when the very act of government speech . . .
monopolizes the marketplace of ideas”).
\textsuperscript{141} Delgado, \textit{supra} note 71, at 990. One commentator observes that the government’s speech poses even greater
risks than corporate speech, because its financial resources are much greater than those of corporations, and it has a
more compelling interest in dominating the marketplace of ideas. Cole, \textit{supra} note 40, at 707.
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subsidizing the ‘friendly’ press or, better still, by establishing an inexhaustibly more powerful press committed exclusively to its own view.”

When the government’s communication curtails First Amendment press rights, the letter and purpose of the Constitution dictate that the government’s right to speak must be subservient to that of the press. As other scholars have pointed out, the basis for this conclusion is quite clear. The Press Clause constitutionally enshrined the press as an essential “fourth estate” of government whose role is to provide the public a check on the activities of its government. But the “mass dissemination of information to the American public by government agencies circumvents and undercuts the role of the private sector press in our democratic system.” And if the government’s own accounts were to become the main way “by which the public received information about government actions, the press could not perform its checking function.” Communication by the government, if it replaces the press, can threaten the “processes of consent through indoctrination and the withholding of vital information, thereby undermining the power of the citizenry to judge intelligently and to communicate those judgments.” Hence, the Constitution dictates that the government cannot speak in a way that impairs the media’s ability “to engage in mass communications to the public regarding both political and nonpolitical matters of public concern.” When the government speaks in such a way as to overpower the press, the Constitution requires that the government’s speech be restricted.

V. MEDIUM, NOT CONTENT: THE FIRST AMENDMENT BASIS FOR RESTRICTING GOVERNMENT SPEECH

Hence, the Press Clause allows us to clear one hurdle. When it interferes with the press, the government’s speech must be restricted in order to preserve the press’s constitutional checking function. Other scholars have correctly recognized that it is what the Constitution requires. However, even scholars who have correctly identified the constitutional problem with government speech have had difficulty overcoming a second obstacle: crafting a solution to

143 Supra notes 89–93 and accompanying text.
144 Nowak, supra note 49, at 24.
145 Id. at 35.
146 Yudof, supra note 40, at 898.
147 Nowak, supra note 49, at 15.
148 Steven Shiffrin, Government Speech, 27 UCLA L. REV. 565, 607 (1979) (“If a system of free expression is to be preserved, either custom, or statutes, or constitutionally based limitations must provide assurances that government speech will not unfairly dominate the intellectual marketplace.”).
149 See, e.g., Nowak, supra note 49, at 11 (concluding that “the press clause limits . . . government mass communications.”). Although Professor Nowak explains this conclusion most explicitly, other scholars have recognized its veracity as well. See Yudof, supra note 40, at 897 (noting that the historical assumptions about government and the role of the Constitution “justify and interpretation of the first amendment that encompasses limits on government expression”). Note, however, that these authors all wrote before the Supreme Court’s Summum decision. No author has yet investigated the Press Clause implications of government speech after Summum.
the constitutional problem is difficult because answering the question of whether the Press Clause can impose limits on government speech does not help us determine when those limits should apply.

A. The Problem: Content-Based Regulation of Government Speech

The root of this conceptual difficulty is the “dual nature” of government speech as both necessary for good administration and potentially threatening an informed, autonomous citizenry. Even commentators who believe that some government speech is impermissible recognize that most is not only allowed, but necessary for good governing. The Supreme Court has said that “[t]o govern, government has to say something,” and “it is not easy to imagine how government could function if it lacked” this freedom. On the other hand, the First Amendment countenances the danger that government will misuse that freedom for propaganda. But between these “polar extremes—the provision of information to members of the body politic and attempts to sway public opinion through propaganda that stifles dissent—it is difficult for the Court to draw a line concerning the permissible scope of government speech.”

Unfortunately, this perceived difficulty has caused some of the leading commentators to settle for much weaker limitations on government expression than the Press Clause might otherwise permit. But there is a simple reason commentators have reached these logical impasses: they have confused the issue. It may true that the government speaks on a multitude of subjects, and that distinguishing between what content is acceptable and what content is propaganda is a daunting task. But the Constitution does not require that we distinguish good

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150 See Yudof, supra note 40, at 898 (arguing that the explicit constitutional limitation does not “comport with the dual nature of government expression”).
151 Supra notes 40–42 and accompanying text.
153 Supra notes 43–52 and accompanying text.
154 RONALD D. ROTUNDA & JOHN E. NOWAK, 5 TREATISE ON CONSTITUTIONAL LAW § 20.11(b) (4th ed. 2008).
155 Professor Yudof, for example, recognizes that the Constitution could provide a basis for limiting of government speech. Yudof, supra note 40, at 898. But the difficulty distinguishing between “government propaganda and indoctrination” and “government information” leads him to the rather weak conclusion that direct restrictions are unworkable, and the best solution is an indirect “chipping away” at the problem by allowing government speech concerns to inform traditional First Amendment decisions. Yudof, supra note 40, at 899, 906. Professor Kameshine distinguishes between “political” and “nonpolitical” speech, and suggests prohibiting only the former, but immediately recognizes that drawing that line “may be difficult”—and fails to explain what, exactly, nonpolitical governmental speech is. Kamenshine, supra note 52, at 1113. To the extent that nearly all the government says is “political,” his test might be much more restrictive in practice than it appears in theory. Likewise, Professor Nowak observes that the government is engaged in a host of different types of speech, and hence that it is impossible “for the judiciary to create a single test . . . that would determine the constitutionality of all forms of government speech.” Nowak, supra note 49, at 34. He only reaches the modest conclusion that there are no absolute constitutional bars and that right-of-reply to government expression is enough. Nowak, supra note 49, at 41; see also Shiffrin, supra note 148, at 600–01 (noting “the concern that government speech could result in unacceptable domination of the marketplace and the need for measures to confine the danger” but concluding that “drowning out” considerations provide an “unworkable test”).
government speech from bad based on its content. Instead, the distinction between permissible and impermissible speech should be based on the medium the government uses.

B. The Solution: The Practical Basis for Medium-Based Restrictions

The government has been speaking persuasively to the American public since the days of the Revolution, but the vast majority of scholarly articles and judicial decisions identifying government speech as a problem have been written very recently. Other commentators have noticed this phenomenon, but none has examined its implications. Government is saying the same things to the public as it always has—if anything, its proclamations have tended to be more measured and moderate than in the past. Thus, the reason that government speech is raising concerns that it did not raise before cannot be its content. What has changed is the medium the government uses. The problem is not what the government is saying, it is how it is saying it—and therein lies the solution to restricting government speech.

i. New Media and The Advent of the Internet

The lack of explicit constitutional restrictions on government speech may partly be explained by the fact that the Framers did not foresee the possibility that “government might speak so loudly that it would drown out other voices.” Many of the pioneers of government speech theory operated from the same assumption. But the Framers and early scholars had no way of fully comprehending the effects of the rapid rise of powerful new communication media that would call that assumption into question. Nearly all academic discussion of the problem of government speech has taken place over the past twenty-five years, and most of it has been much more recent than that. During that time, communication technology has experienced changes that are nothing short of revolutionary. In 1979, when Professor Yudof wrote his seminal article on government speech, he concluded that government speech using modern technologies created new constitutional problems. But at that time, cable television was only in one in five

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156 Although the proliferation of Free Speech and Free Press litigation generally is a relatively recent phenomenon in American constitutional law, MARC A. FRANKLIN ET. AL., MASS MEDIA LAW 2–7 (7th ed. 2005), government speech doctrine is even more recent. For example, Professor Yudof’s article, supra note 40, identified by many as the seminal article on government speech scholarship, was written in 1979.

157 See supra notes 15–29 and accompanying text (describing ways different governments spoke in the past); GELDERMAN, supra note 17, at 1–10 (chronicling the rise of the presidential “bully pulpit” from Theodore Roosevelt’s presidency onward).

158 Schauer, supra note 16, at 383.

159 See Van Alstyne, supra note 142, at 534 (noting that, thus far the problem of powerful government speech “has been largely hypothetical”); Kamenshine, supra note 52, at 1153 (conceding that government advocacy does not presently pose “a serious threat to democratic processes in this country”). This may help explain why the First Amendment limitations these authors proposed, if any, were generally rather weak. See supra notes 155 and accompanying text (describing the weak limitations proposed by other scholars).

160 Yudof, supra note 40, at 10–12.
homes. \(^{161}\) Cellular phones, personal computers and the internet were in their infancies. \(^{162}\) In 1985, Professor Delgado noted that communications technology could magnify the government’s already powerful voice, but the technologies he had in mind were “reports, releases, films, commercials, and press conferences.” \(^{163}\) Three years later, when Professor Nowak first proposed Press Clause limitations on government speech, one way he justified his conclusion was by pointing to the rapid changes in mass media technology. \(^{164}\) His fear, though, was the growth in cable television and the widespread use of communications satellites. \(^{165}\) While these authors foreshadowed the government-speech implications of new technologies, they all wrote before the widespread adoption of the most powerful new technology of all—the internet. None of them mentions personal computers, much less the internet. \(^{166}\) Yet now, a few decades later, the internet is indisputably becoming the world’s prime communication medium. \(^{167}\)

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\(^{165}\) *Id.* at 6–7.

\(^{166}\) The first academic article to raise the government-speech implications of the internet was published in 1999, and only addressed the topic superficially. See Steven G. Gey, *Fear of Freedom: The New Speech Regulation in Cyberspace*, 8 TEX. J. WOMEN & L. 183, 185–86 (1999) (discussing government speech theory’s impact on internet access at public libraries).

The internet is different from—and more powerful than—older communication media for several reasons. It has opened up new means of communication, such as chat rooms, newsgroups and e-mail, which can be transmitted across vast distances “without degradation, decay, or substantial delay.” 168 It permits mass communication at much lower cost. 169 Internet media is more durable than print or broadcast media, because its content can be easily and repeatedly accessed over a longer period of time. 170 It is very pervasive, much more so than equivalent print forms. 171 For example, internet messages can be amplified by repeated forwarding, allowing recipients to become speakers in their own right. 172 It is both easy to access and easy to disseminate information on the internet. 173 And, unlike other media, the

169 Thomas B. Nachbar, Paradox and Structure: Relying on Government Regulation To Preserve the Internet’s Unregulated Character, 85 MINN. L. REV. 215, 215 (2000) (explaining that the “Internet allows people to communicate quickly, across the globe, and at extremely low cost”).
171 See Lyrissa Barnett Lidsky, Silencing John Doe: Defamation and Discourse in Cyberspace, 49 DUKE L.J. 855, 863 (2000) (noting that internet communications are “communicated through a medium more pervasive than print,” and commenting on the implications of that fact in defamation law); see also Laura Leets, Responses to Internet Hate Sites: Is Speech Too Free in Cyberspace?, 6 COMM. L. & POL’Y 287, 288 (2001) (“As scholars have noted, the Internet is a powerful forum of communication with its broad reach, interactivity and multi-media capability to disseminate information.”).
172 Stacey D. Schesser, Comment, A New Domain for Public Speech: Opening Public Spaces Online, 94 CAL. L. REV. 1791, 1797 (2006); see also Lidsky, supra note 171, at 864 (noting how easy it is for individuals to rapidly “republish” information received via the internet).
173 Regarding the ease of access, see Joel M. Schumm, Names, Please: The Virtual Victimization of Children, Crime Victims, the Mentally Ill, and Others in Appellate Court Opinions, 42 GA. L. REV. 471, 475–76 (2008) (“The pervasiveness of Internet access and the ease with which information of all types and sources may be accessed by search engines such as Google now allow virtually anyone—employers, neighbors, acquaintances, and even adversaries—to access wealth of personal information about others with a few keystrokes.”); Alan F. Williams, Prosecuting Website Development Under the Material Support to Terrorism Statutes: Time to Fix What’s Broken, 11 N.Y.U. J. LEGIS. & PUB. POL’Y 365, 399 (2008) (noting how the Supreme Court has sometimes exclusively focused on strengths of the internet, such as “a vast virtual library of reach, the ability of those with limited means to publish, a decentralized structure, the lack of significant control or supervision, and ease of access”).
Regarding the ease of dissemination, see Jennifer LaMaina, Wipe Out in ACLU v. Johnson: Can Any Regulation of Surfing the Net Withstand Constitutional Scrutiny?, 8 VILL. SPORTS & ENT. L.J. 137, 137 (2001) (“The Internet (‘Net’) is an increasingly powerful medium in twenty-first century society, interconnecting people and ideas on a global scale. Never before has the dissemination of information, images and messages been so effortless and unrestricted as it has been in cyberspace.”).
internet is a largely unregulated medium where, most often, “anything goes.”

Thus, commentators have noted how internet content is permeating every American’s daily life.

The lack of regulation, the flexibility of technology and the two-way ease of access have resulted in a massive proliferation of individual speakers on the internet. Indeed, “[w]ith the rise of the Internet as a powerful medium of mass communication and a new public forum, anyone with a dial-up account ‘can become a town crier with a voice that resonates farther than it could from any soapbox.”

The implications of the Internet’s rapid development for the function performed by an expressive access right should be obvious. The Internet provides private individuals with the opportunity to circumvent the institutional media as both a source of communicative power and as a method of information retrieval. It may be true that an individual’s power to reach the public through the Internet does not match that of a national television network. The fact remains, however, that the individual’s power to instantaneously convey her message to a wide audience has grown significantly in recent years, because of this technological advance.

This proliferation of voices might seem to bode well for democratic discourse and provide an important check on improper government speech. Indeed, some writers—especially during the internet’s infancy—felt that the internet would provide greater access to the marketplace of ideas. But recent empirical research supports the opposite conclusion: the internet may be making communication less democratic. Surprisingly, websites’ “visibility” to internet users is

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174 Sato, supra note 168, at 709 (describing the internet as “highly unregulated; cyberspace is not subject to any central control and operates without any supervision. . . . Since there is no supervising or police-like authority which overlooks activity on the Internet, ‘anything goes’ in cyberspace”). See also Nachbar, supra note 169, at 215 (calling the internet “a place with relatively few rules”).

175 See William D. Araiza, Captive Audiences, Children and the Internet, 41 BRANDEIS L.J. 397, 407–08 (2003) (applying “captive audience theory” to the internet and concluding that it raises the same pervasiveness concerns as radio transmissions); see also Rothman, supra note 170, at 138 (“Internet media is much more pervasive than traditional media.”).


178 E.g., Donald J. Kochan, The Blogosphere and the New Pamphleteers, 11 NEXUS 99, 99 n.2 (2006) (quoting Jeffrey Rosen, The End of Obscenity, BALTIMORE SUN, June 28, 1996, at 15A) (contending that the internet is “reducing the costs of entry for both speakers and listeners and creating relative equality” among participants, helping to establish “a perfectly deregulated marketplace of ideas”); Lidsky, supra note 171, at 894 (asserting that “the Internet promises to eliminate structural and financial barriers to meaningful public discourse, thereby making public discourse more democratic and inclusive, less subject to the control of powerful speakers, and, at least potentially, richer and more nuanced” and that it therefore “promises to make the marketplace of ideas more than just a hollow aspiration.”); Eugene Volokh, Cheap Speech and What it Will Do, 104 YALE L.J. 1805, 1832 (1995) (positing that the internet might “both democratize the information marketplace—make it more accessible to comparatively poor speakers as well as rich ones—and diversify it”).

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actually very skewed, with a very few highly-visible websites and a very “long tail” of nearly invisible ones. Because “the topology of the Web prevents us from seeing anything but a mere handful of the billion documents out there,” one of the most influential empirical studies found a “complete absence of democracy, fairness, and egalitarian values on the Web.” On the internet, while everyone has theoretically equal power to communicate, in reality a handful of powerful speakers can dominate the speech marketplace.

ii. Government’s Use of the Internet

Evidence shows that the U.S. government is making use of the internet’s power to become one of that handful of dominant speakers. The internet is rapidly becoming the government’s prime method of communicating with the public. The Louisiana State University Libraries Federal Agency Directory counts nearly 1400 distinct federal government websites, and more than 11,400 state and local governments now have publicly-accessible websites online. Moreover, many Americans support using the internet in a limited role to communicate with their public officials. And perhaps the most successful user of the internet

180 Bracha & Pasquale, supra note 179, at 1159 (quoting ALBERT-LÁSZLÓ BARABÁSI, LINKED: HOW EVERYTHING IS CONNECTED TO EVERYTHING ELSE AND WHAT IT MEANS FOR BUSINESS, SCIENCE, AND EVERYDAY LIFE 56 (2003)).
183 See Rebecca Fairley Raney, National Briefing Washington: Poll on Internet’s Role in Governance, N.Y. TIMES, Feb. 26, 2002, at A20 (citing a poll conducted by the Council for Excellence in Government that found that nearly two-thirds of respondents felt that “e-mail messaging would make agencies and public officials more accountable, but 63 percent rejected the idea of casting votes for federal offices via the Internet”).

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in federal government history is our new president. Not only did his campaign’s masterful use of the power of the internet play a large part in getting Barack Obama into the White House, but the president has made it a clear priority of his new administration to use the internet to build consensus, to advocate for the passage of legislation, and to foster transparency, all by communicating his message “directly to the public.” The internet offers presidents a modern “bully pulpit” that can allow them “simply to bypass Congress and the media that they do not like (or that does not like them) and to address the public whenever they please as directly as possible.” Recognizing that, thanks to the internet, “the power of the media is overrated,” President Obama and his team have “push[ed] out the message that he wanted to dominate the day rather than the message the media was focused on.”

With Obama, the presidential bully pulpit has expanded again. Already labeled the Internet President, Obama is evidently intent on getting out of the Washington “bubble” to sell his policies directly to the American public. His regular use of the bully pulpit since the inauguration has kept his personal approval ratings high, above even the levels of support his policies enjoy.

The talk in Washington is how “Mr. Obama will transfer his technological tricks from the campaign trail to the White House, and use his impressive social networking skills to rally support for an ambitious agenda.” Those efforts have already begun in earnest. For example, the president has used YouTube to change a presidential routine—the weekly Saturday radio address—into a newsworthy event. Members of the public, who spent more than 14 million hours during the campaign watching official videos on the internet, have already logged onto the weekly address site millions of times. The audio version of the address is consistently

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184 Supra note 32 and accompanying text.
185 Supra note 5 and accompanying text.
186 Michael J. Gerhardt, Privacy, Cyberspace, and Democracy: A Case Study, 32 CONN. L. REV. 907, 916 n. 33 (2000). For a discussion of the historical concept of the presidential “bully pulpit,” see generally GELDERMAN, supra note 17; see also Parisella, supra note 30 (noting that “Obama firmly believes the presidential bully pulpit is the way to go” and that he uses the internet “to sell his policies directly to the American public.”).
187 Cillizza, supra note 31. President Obama has also been a master at reaching the audience he wants, rather than the one the media has picked for him. See Obama To Appear on “The Tonight Show” Thursday (NPR radio broadcast Mar. 17, 2009), available at http://www.npr.org/templates/story/story.php?storyId=101988460 (noting how Obama will be the first sitting president to appear on “The Tonight Show” but will also be the first president since Grover Cleveland to decline his inaugural invitation to the Gridiron Dinner).
188 Parisella, supra note 30.
189 Stolberg, supra note 5.
190 For a description of President Bush’s use of the radio address, and its middling results, see Bumiller, supra note 27.
191 Cillizza, supra note 31.
192 Wagner, supra note 30.
among the ten most popular podcasts on iTunes. And one of the primary vehicles the administration has used to garner support for the $787 billion American Recovery and Reinvestment Act is the White House’s recovery.gov website. The messages contained in these websites and podcasts are by no means sinister propaganda. In them, the president and his team do what other administrations have always done—speak to the public to advocate for their point of view. But the messages are unquestionably persuasive, all the more so because of the government’s use of the new media. Now, more than ever, a robust press corps is needed to question the government’s view of events. What raises a constitutional problem is that a strong press might soon not exist.

iii. The Demise of Traditional Mass Media

What exacerbates the problem of the government’s increasingly prominent message is the fact that the mass media is rapidly transforming toward a form that provides less checks on government speech. In March, 2009, after 146 consecutive years of publishing the Seattle Post-Intelligencer printed its last issue. Two weeks earlier, the Rocky Mountain News shut down, and within two weeks, the Tucson Citizen folded as well. This left each of these cities with only one daily—and industry observers suggest that some of these one-newspaper markets will soon become “no-newspaper markets.” This has already happened in smaller markets: on March 23, 2009, the New York Times reported that four Michigan markets—Flint, Saginaw, Bay City and Ann Arbor—would be losing their daily papers. Many other newspapers are on the brink of bankruptcy or are searching for buyers. And other media are not immune. Between

194 Apple iTunes, Podcast Homepage, Top Podcasts (last visited Mar. 19, 2009).
196 RECOVERY.GOV, www.recovery.gov (last visited Mar. 19, 2009). The website is currently run by the White House’s Office of Management and Budget, Alice Lipowicz, Officials Struggle with Data for Recovery.Gov, FED. COMPUTER Wk., Mar. 19, 2009, http://fcw.com/articles/2009/03/19/data-is-a-challenge-for-recovery.gov.aspx, but its functions may eventually be transferred to the Recovery Accountability and Transparency Board, an oversight group established by the American Recovery and Reinvestment Act, Who Runs Recovery.gov?, RECOVERY.GOV (last visited Mar. 19, 2009). Although it is characterized as an informational resource, the site is unquestionably designed to persuade. The website features a video of the president explaining and promoting the Act, and describes how it will “save or create good jobs immediately.” While the website declares itself the “centerpiece” of the government’s efforts at “full transparency and accountability,” id, some commentators are skeptical. See Chris Soghoian, Recovery.Gov Blocked Search Engine Tracking, CNET.NEWS, Feb. 19, 2009, available at http://news.cnet.com/surveillance-state/?tag=rb_content;overviewHead (analyzing the technical design of the website and wondering if it provides evidence that the administration’s “much-publicized commitment to transparency is simply hype”).
197 See, e.g., supra note 196 (noting the persuasive elements of the recovery.gov website).
200 id.
202 Pérez-Peña, supra note 199.
2002 and 2007, for example, total viewership for evening network news dropped nearly 20%. Local television and radio news stations have experienced similar trends.

The implosion of traditional news outlets can be attributed to a multitude of causes, but many commentators agree that the internet is a prime factor. According to a recent survey by the Pew Research Center for the People and the Press, Americans are largely abandoning print newspapers as they turn to the internet for news. Furthermore, while online readership is growing rapidly, that growth has failed to offset the decline in print readership so overall news consumption is decreasing. Between 2000 and 2008, the percentage of respondents who read print newspapers for their news decreased by nearly 30%, while the percentage of internet news readers increased more than 60%, and for the first time, more respondents used the internet for news than newspapers or radio newscasts. As readership has dropped, so has advertising revenue, which is the lifeblood of the newspaper industry, declining approximately 25 percent.


205 See, e.g., PROJECT FOR EXCELLENCE IN JOURNALISM, Network TV, in THE STATE OF THE NEWS MEDIA 2008: An Annual Report on American Journalism (2008), available at http://www.stateofthenewsmedia.org/2008/narrative_special_advertising.php?media=13 (concluding that “digital technology . . . has, effectively, splintered mass media.”); Richard Pérez-Peña, Paper Cuts: An Industry Imperiled by Falling Profits and Shrinking Ads, N.Y. TIMES, Feb. 7, 2008, at C1 (pointing out that newspaper advertising revenue fell in 2007, and attributing the decline to the “long-term shift of advertising to the—especially classified ads for things like jobs, cars and houses” that accelerated in 2006 and also noting the industry consensus that “newspapers have done a poor job adapting to the Internet and working creatively and aggressively to sell ads.”); see also Adam Candeub, Media Ownership Regulation, the First Amendment, and Democracy’s Future, 41 U.C. DAVIS L. REV. 1547, 1609 (2008) (arguing that the internet “is transforming media structure”).

206 PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS, NEWSPAPERS FACE A CHALLENGING CALCULUS: ONLINE GROWTH, BUT PRINT LOSSES ARE BIGGER (2009), available at http://pewresearch.org/pubs/1133/decline-print-newspapers-increased-online-news. In 2006, 43% of respondents said they read a newspaper yesterday—either in print or online—but two years later that number had dropped to 39%.

207 See PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS, KEY NEWS AUDIENCES NOW BLEND ONLINE AND TRADITIONAL SOURCES (2008), available at http://people-press.org/report/444/news-media, (percentage of survey respondents who responded “read a newspaper yesterday” dropped from 47% to 34% while percentage “online for news three or more days a week” increased from 23% to 37%).
since 2007.\textsuperscript{208} Classified websites like Craigslist.com have been to print classifieds what “the internal combustion engine was to horse-drawn buggies.”\textsuperscript{209} By most accounts, the traditional mass media is an endangered species.

Instead, traditional news outlets are rapidly being replaced by online sources. In 2008, the internet surpassed all sources except television as the destination for national and international news.\textsuperscript{210} This shift has changed the way the public receives its news. Although some internet content is provided by traditional media companies who have gone online, much of it also comes from brand-new, electronic-only sources. In 2008, for example, three of the top five news sites by traffic volume, according to one survey, had no traditional analogue—Yahoo News, Google News and the Drudge Report.\textsuperscript{211} And other online sites continue to be ascendant. After barely registering in the political debate in 2004, huffingtonpost.com was among the twenty most visited sites during the 2008 election.\textsuperscript{212} Between 2007, politico.com and realclearpolitics.com both increased their readership by about 500%.\textsuperscript{213} Studies have shown that these changes make a difference—online news outlets report the news differently than “legacy” media. For example, in 2008, the Rod Blagojevich scandal was the sixth-most popular story in print and broadcast, but did not crack the top ten online.\textsuperscript{214}

The internet has not only redefined the major players, but it has also dramatically increased their number. The internet’s very nature makes online news cheaper to produce, and hence allows for more outlets. And more outlets allows each to be much more topic- or viewpoint-specific, which some commentators have called the “splintering” of the news online.\textsuperscript{215} For instance, a single individual might visit cnn.com for her national news, slate.com for political commentary, espn.com for sports and tmz.com for celebrity gossip. Liberals have Daily Kos, conservatives have the Drudge Report, and libertarians have libertarian.com. Roman

\textsuperscript{208} Pérez-Peña, supra note 199; see also Pérez-Peña, supra note 205 (reporting the decline in advertising revenue).

\textsuperscript{209} Pérez-Peña, supra note 199.


\textsuperscript{213} Id.


Catholics can visit catholicnews.com while Evangelicals browse CBN.com. Five people who may have previously been faithful NBC Nightly News watchers might very well depend on five totally different news sources once they make the switch online. Thus, as the internet creates a much larger number of speakers, each one’s voice becomes relatively less strong.\(^\text{216}\)

The reason this matters, from a constitutional standpoint, is that the new internet media may prove a poor substitute for the traditional media’s checking function of government speech. An influential empirical study found that, from 1996 to 2000, politically interested Internet users abandoned traditional media at a much greater rate than they increased their use, and did so at a greater rate than internet users who were not interested in politics.\(^\text{217}\) And these new internet sources “cater to more individualized and fractured tastes.”\(^\text{218}\) Thus, instead of the situation that prevailed in the past—where several large media outlets were influential enough to coherently challenge the government—the number of speakers is multiplying to the point where none of them will have sufficient influence to counter the government’s story. The splintering of the news on the internet has been called a “media dystopia,” and it raises concerns that the new media will be unable to perform the same role as the traditional mass media.\(^\text{219}\) The transition to digital-only newspapers “may presage an era of news organizations that are smaller, weaker and less able to fulfill their traditional function as the nation’s watchdog.”\(^\text{220}\)

### C. The Legal Basis for Medium-Based Restrictions on Government Speech

Medium-based restrictions are not only wise from a practical standpoint; they also have a sound basis in Constitutional theory and in judicial history. First, other cases provide precedent for medium-based restrictions on speech that would normally be protected by the First Amendment. In FCC v. Pacifica Foundation, the Supreme Court held that the FCC could regulate “indecent” content on the airwaves—even if the same content might be protected if it were published in print—and that a New York radio station had therefore violated the law when it broadcast George Carlin’s “filthy words” monologue in the middle of the afternoon.\(^\text{221}\)

\(^{216}\) MIT’s Nicholas Negroponte has dubbed the new custom-edited newspapers “The Daily Me.” Mark S. Nadel, Customized News Services and Extremist Enclaves in Republic.Com, 54 STAN. L. REV. 831, 833 (2002) (citing NICHOLAS NEGRONPOTE, BEING DIGITAL 153 (1995)). In his book Republic.com, Professor Cass Sunstein argues that over-reliance on Daily Mes threatens the very foundations of American democracy by “restrict[ing] the attention of even open-minded citizens to the few areas of their specialized interests.” Id. (reviewing CASS SUNSTEIN, REPUBLIC.COM (2001)). Professor Sunstein worries that excessive use of customized internet news will “leave individuals oblivious of many of the shared experiences that now unify the nation as well as the challenging new viewpoints and issues that now reach them via unexpected or unchosen exposures”). Id.


\(^{218}\) Candeub, supra note 205, at 1554.

\(^{219}\) Id.

\(^{220}\) Pérez-Peña, supra note 199.

According to the majority opinion, “each medium of expression presents special First Amendment problems.” The special problem that broadcasts over the airwaves presented was their pervasiveness. “Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual’s right to be left alone plainly outweighs the First Amendment rights of an intruder.” Because the medium in Pacifica was more pervasive than others, the FCC could restrict it in ways that would be impermissible with respect to other media and still remain within the bounds of the Constitution. Analogizing to Pacifica, some commentators have proposed similar medium-based restrictions on the internet outside the government speech context. Others argue that the internet is even more pervasive than broadcasts.

In another example of medium-based restriction on speech, in Wooley v. Maynard, the Supreme Court upheld an injunction that allowed a group of New Hampshire Jehovah’s Witnesses to conceal the “Live Free or Die” motto emblazoned on state license plates. The Court held that the state could not compel citizens to become couriers for its message, but explicitly refused to hold that the message itself was inappropriate. Therefore, Maynard limits “the ways a state can speak and not the substance of its expression.”

A potential barrier to these proposed medium-based constitutional restrictions of government speech is the fact that American courts have generally accorded speech on the internet broad protections under the First Amendment. Reno v. American Civil Liberties Union, the first U.S. Supreme Court case to address the issue, involved a challenge to federal legislation limiting the dissemination of sexual content on the internet. Analogizing to Pacifica, the government argued that the internet should receive less constitutional protection than other forms of speech. But the Supreme Court explicitly rejected this argument, according the highest

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222 Id. at 748.
223 Id.
224 Bruce W. Sanford & Michael J. Lorenger, Teaching an Old Dog New Tricks: The First Amendment in an Online World, 28 CONN. L. REV. 1137, 1151 (1996) (noting how “Pacifica illustrates the Supreme Court’s attempt to distinguish among the various media based on the level with which they intrude into the average person’s daily life and the ease with which exposure to offensive material distributed by way of those media can be avoided.”).
225 See generally id. (proposing some content restrictions).
226 See Mehmet Konar-Steenberg, The Needle and the Damage Done: The Pervasive Presence of Obsolete Mass Media Audience Models in First Amendment Doctrine, 8 VAND. J. ENT. & TECH. L. 45, 67 (2005) (contending that “WiFi, distributed computing, popups, and convergence devices are giving new meaning to the phrase ‘pervasive presence’” on the internet); Araiza, supra note 175, at 408 (arguing that, like in Pacifica, “users of the Internet may be put to a very difficult choice,—use an extraordinarily powerful information medium, present in the home and always beckoning, or leave.”).
228 Id. at 717.
229 Yudof, supra note 40, at 892.
231 See Brief for the Appellants at ¶ (C)(1)(a), Reno v. American Civil Liberties Union, No. 96-511 (U.S. Jan. 21, 1997), available at http://www.ciec.org/SC_appeal/970121_DOJ_brief.html (arguing that “[t]he approach Congress enacted is constitutional under Pacifica” because “[l]ike broadcast stations, the Internet is establishing an increasingly ‘pervasive presence’ in the lives of Americans.”).
level of scrutiny to communications on the internet. The Ninth Circuit has explained that First Amendment protections on the internet are equivalent to those granted “prior to the high-tech era.” And the Second Circuit has also expressed its disinclination towards judicial activism regarding its application of the First Amendment to the internet.

However, the fact that American courts have almost universally given speech on the internet broad protections does not preclude regulating government speech. If anything, it supports it. We have seen that the threat posed by government speech on the internet is the drowning out or interference with the public’s free expression and the media’s checking function. And courts have been much more solicitous toward individual speech than toward any countervailing governmental interests—even ones with particular “legitimacy and importance.” Limiting government speech is consistent with these judicial priorities, and hence does not conflict with Supreme Court internet speech decisions.

Furthermore, medium-based Press Clause restrictions on government speech are justified by the constitutional purpose of the Clause. The purpose of the Press Clause was to establish the press as a watchdog on government. An implicit assumption was that the press would always be able to speak strongly enough to perform that function, so long as it was free from active attempts by the government to silence it. But technology has called that assumption into question. Many commentators now agree that the government has the means to dominate the “marketplace of ideas.” The weakening of traditional media means that the balance of power in the marketplace is shifting toward the government—so the implicit limitations provided by the Press Clause’s freedoms are no longer enough. To preserve the Press’s constitutional checking role in the internet age, active prohibitions are required. If courts find that government speech via a particular medium is drowning out the press, the government’s speech must be silenced.

VI. CONCLUSION

The rise of the government media and the decline of traditional mass media are in the process of creating an environment that the first scholars to write about government speech never

232 Reno v. American Civil Liberties Union, 521 U.S. at 868–70.
233 Clement v. Cal. Dept. of Corrections, 364 F.3d 1148, 1151 (9th Cir. 2004).
234 See Name.Space, Inc. v. Network Solutions, Inc., 202 F.3d 573, 584 (2d Cir. 2000) (observing that “the lightning speed development of the Internet poses challenges for the common-law adjudicative process” and hence left the court “wary of making legal pronouncements based on highly fluid circumstances”).
235 Reno v. American Civil Liberties Union, 521 U.S. at 849.
236 See, e.g., Kamenshine, supra note 52, at 1104, 1106 (contending that the “government has the potential to use its unmatched arsenal of media resources . . . to obtain political ends, to nullify the effectiveness of criticism, and, thus, to undermine the principle of self-government” and that “[t]he penetration of government into more and more aspects of modern life, including the field of mass communication . . . raise[s] grave issues as to the proper role of government in controlling communication and molding thought and expression in a democratic society.”); Nowak, supra note 49, at 4–5 (stating that “the government, more than any corporate entity or group of private persons, has the ability to convince a large segment of the populace to support specific provisions regarding social or governmental policy.”); Komp, supra note 70, at 870 (suggesting that some communications can be so voluminous as to “inundate the marketplace”).

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thought would be possible. The internet is eroding the power of the traditional media, while simultaneously reinforcing and consolidating the government’s power as a speaker. And the online “new media”—the internet news sources that are supplanting traditional media outlets—are too fragmented to provide a coherent alternative to the government’s version of events. At least for the time being, the government is emerging as one of the few monolithic speakers on the internet. These dynamics are working together to create the very real possibility that the government’s speech on the internet will drown out the mass media.

This is not to say that the government’s message is inappropriate. So far, the Bush and Obama administrations have used the internet for the same types of speech as government has always engaged in. But while the content has remained the same, the context of government speech has changed. The government’s use of the internet has the potential to limit—if not outright negate—the media’s constitutional role as the “fourth estate,” the check on government enshrined by the Press Clause of the First Amendment. It is the government’s access to the power of the internet, and not its speech itself, that raises constitutional problems. Therefore, the Constitution requires that the government’s use of that medium be restricted to the extent that it interferes with the checking function of the press.

The purpose of this paper is not to argue that the government should never be allowed to speak persuasively—that is an essential function of government which should be preserved. Nor is its purpose even to argue that the government can never speak persuasively on the internet. Instead, its goal is to point out that Press Clause protections are fundamentally different from Free Speech protections, and that distinction is very important for future legal challenges to persuasive government speech. The Supreme Court’s recent decision in Summum precludes Free Speech challenges, but leaves the door open to challenges grounded in the Press Clause. Moreover, contrary to historical government speech theory, the rise of the internet is in the process of dramatically changing the balance of power between the government and the press, a balance that was created in the Constitution to promote democracy and discourage despotism. Both legal and factual circumstances suggest that courts may soon be called upon to adjudicate whether particular forms of government speech unconstitutionally limit the press’s checking function. When that happens, courts should abandon the current standard that “government is entitled to say what it wishes.” Instead, the Press Clause allows government speech to be silenced when it interferes with the press’s checking function. And the determination of what speech “interferes” should be based on the medium the government uses, and not the content it expresses. The next challenge to government speech may very well be made in the context of internet communication, and because the medium itself is so powerful that its use by the government raises serious constitutional concerns, courts should give serious consideration to restricting persuasive government speech on the internet.
RIGHT TO FREE SPEECH IN A CENSORED DEMOCRACY

Subhradipta Sarkar*

‘I disapprove of what you say, but I will defend to the death your right to say it.’ – Voltaire

I. INTRODUCTION

Official accounts claim that Indian film industry is the largest in the world producing over a thousand films in a year screened over 13,000 cinema halls in the country. Every three months an audience as large as the country’s entire population flocks to the cinema halls.¹ Notwithstanding the industry’s gigantic volume, so long one makes stereotype commercially viable movies with only songs and dance sequences and follow common formulas of entertainment – there is no harm; but the moment, one dares to speak out the truth against the State articulating his opinion on any sensitive or serious matter through his films or documentaries, which may not be palatable to certain power holders; he is swimming into troubled waters. There is ample possibility of facing censor scissors or political ban.

While several films like ‘Water’, ‘Final Solution’, ‘War and Peace’ and many more ran into serious trouble with the Central Board of Film Certification (hereinafter Censor Board or Board) as they were restrained in the name of ‘public interest’, other films like ‘The Da Vinci Code’, the very recent ‘Deshdrohi’ (Traitor) had to fight political censorship even after Censor Board’s approval. These are in no way stray incidents but almost a systematic trend in India. Apparently, those incidents may be pooh-poohed as political gimmicks or other trifles, but there is a much deeper aspect involved – subjugation of freedom of speech and expression.

Freedom of speech and expression is the concept of being able to express oneself freely whether through words of mouth, literature, art, or any other medium of communication. It is often regarded as an integral concept in modern liberal democracies. On the other hand, censorship represents denial of freedom of speech, of expression and of information. Despite the fact that the Constitution of India does not expressly mention motion pictures as a medium of speech and

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¹ Central Board of Film Certification Home Page, http://www.cbfcindia.tn.nic.in/ (last visited Aug. 21, 2008).
expression, they have been so accepted through various court decisions. Films in India have been censored on the grounds of obscenity, sex and violence; but this paper does not intend to venture into those areas, rather it explores elsewhere where films have been banned or targeted in the name of maintaining public order; respecting beliefs, sentiments and traditions; or for criticizing the State on certain issues. The paper does not endeavor to go into the intricacies of the problems; instead, it limits itself to testify the legality of censorship in the light of the freedom of speech and expression. In this pursuit, it presents some controversies of the recent times, highlights certain judgments and relevant legal provisions. Although the paper concludes such censorship as illegal and arbitrary, it also attempts to find a way out for ensuring better protection of free speech as far as motion pictures in India are concerned.

II. LEGACY OF THE ‘BAN’ STORY

In 2008, Maharashtra Navnirman Sena (MNS, Maharashtra Reconstruction Army), spearheaded by Raj Thackeray, unleashed unprecedented violence to push back the poor North Indian economic migrants (largely from the States of Uttar Pradesh and Bihar) from Maharashtra, especially from Mumbai, reasoning that they have seized the employment opportunities of the Marathis (residents of Maharashtra) and have caused unemployment problem. Hence, they should be repatriated to their home States, if necessary, by force. The State Government of Maharashtra had been almost a mute spectator to this regionalism until it spilled over and invited strong notice from the Central Home Ministry. Finally, the State Home Department registered 54 criminal cases against Thackeray for rioting, assault, damage to properties, provoking hatred among different communities, etc. Even so, Thackeray managed to get bail in all the cases.2 When Kamal Khan tried to capture the plight of those migrants in his film ‘Deshdrohi’, otherwise callous State Government immediately banned the movie for two months acting on the report of the police that if the film is released in the same format it may lead to ‘law and order’ problem in the State.3

The Bombay High Court had cleared the screening of the film on the ground that the State’s ban on its release was based on ‘extraneous grounds’. Yet the film was not released in the State. Finally, after the matter reached the Supreme Court. The apex court also cleared the movie for screening in the State. The court refused to agree with the contention of the Maharashtra Government, that if the film was screened it would lead to a law and order problem.4 Nonetheless, the most unfortunate part is that the fight of the producer is far from over. The film, scheduled to be screened in nearly 70 theatres across the State, could not be released as police

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refused to provide protection to theatre owners who have been allegedly receiving threats from MNS.  

Based on a true story and made in the backdrop of 2002 Gujarat pogrom, ‘Parzania’ revolves around a Parsi family, with parents and two kids, in Ahmedabad in Gujarat. The family is caught in the midst of the religious madness, and suffers. While the girl, Shernaz manages to flee; the boy, Parzan is nowhere to be found. The family waits for Parzan. The film ends with a photograph of Azhar, a real boy still missing since the Gujarat riots, in the hope that the film may help his parents, the director Rahul Dholakia’s friends, to get some news of him. In 2007, at the 53rd National Film Awards, Dholakia was named as the Best Director for this film. Icing on the cake was Sarika to be adjudged the best actress in recognition of her performance in the same film. The film with such a strong message should be screened as widely as possible. Unfortunately, that’s not the scenario in India. In fact, Dholakia had strong apprehension on the uncertainty in clearing off the film by the Board. He made the film in English and not in any Indian language so that he could at least get the film released abroad. His fears were justified when the Censor Board took a long time for clearance. Problems did not desert him even with Censor Board’s certificate. After a positive nod from the Censor Board, Bajrang Dal (Army of Hanuman) with the tacit support of the ruling Bharatiya Janata Party (BJP, Indian People’s Party) Government in the State of Gujarat slapped a political ban on the movie in Gujarat – the place where the film matters the most. Fearing Bajrang Dal’s threat, the multiplex owners were unwilling to release the movie on the scheduled date in Gujarat. Of course, they cited that it was ‘commercially nonviable’. The Government pleaded ignorance about the reasons for the film not being released and washed off their hands. Such censorship resembles Paul O’Higgins’

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6 On February 27, 2002, 59 Hindus were charred to death when the Sabarmati Express train at Godhra (Gujarat) was set on fire. In reaction to that incident, what followed in Gujarat was unprecedented in the communal history of the country since the Partition in 1947. Some 2500 Muslims were murdered; hundreds of women raped and thousands were rendered homeless. See generally Dione Bunsha, Five years after Godhra and the pogrom, THE HINDU, Feb. 28, 2007, available at http://www.hindu.com/2007/02/28/stories/2007022802811000.htm.
7 This is conferred every year by the Directorate of Film Festival of the Government of India.
10 It is perceived as a radical Hindutava force.
11 This was the key political party in the National Democratic Alliance (NDA) coalition Government, which was in power at the Centre for a full term during 1999 – 2004 under the Prime Ministership of Atal Behari Vajpayee before the present United Progressive Alliance led by Congress party. See generally Bharatiya Janata Party, WIKIPEDIA.ORG, http://en.wikipedia.org/wiki/Bharatiya_Janata_Party (last visited Mar. 2, 2008).
subterranean censorship’, where an individual or institution uses power set aside for another purpose to impose censorship without direct government involvement.\textsuperscript{13}

It is not long back, when in 2006, incidents of vociferous protests of many Christian communities against screening of ‘The Da Vinci Code’ dominated the press and media for quite some time. The storyline of the film invited ire of various religious, political and radical groups who viewed it as ‘blasphemous’ and ‘offensive’.\textsuperscript{14} The Hollywood creation, based on the bestselling 2003 novel by author Dan Brown was gradually banned by seven State Governments\textsuperscript{15} in their respective territories after being cleared by the Censor Board. The reason cited by almost all the Governments was that the movie might hurt the ‘religious sentiments’ of the people of the minority community; hence, disturb the ‘peace and tranquility in the State’.\textsuperscript{16}

When this was the scenario in India, curiously, apart from few hiccups and protests, the movie was released with a bang in most of the Christian countries in the West on May 18, 2006.\textsuperscript{17} In spite of the fact that the novel is on sale (both genuine and pirated copies) in India since its publication, there was a huge outcry in many States of India by the Christian organizations to ban the film from screening in India for the perceived anti-Christian message. Following special screenings for various Catholic leaders and the Information and Broadcasting Minister, Priya

\begin{itemize}
\item Government have received representations from various Minority Organizations, in general and Christian organizations, in particular, requesting the Government to impose ban on exhibition of the movie ‘The Da Vinci Code’ to be released in the State of Andhra Pradesh on 2\textsuperscript{nd} June, 2006. The ban should be from 2\textsuperscript{nd} June 2006 onwards. They contended that the screening of the movie will not only offend religious sentiments but lead to demonstrations, disturb peace and tranquility in the State. The reports from the Government agencies indicate that some Christian groups may take recourse to agitational activities if the film is released and that untoward incidents may take place.
\item Government after taking into consideration of the reports, complaints from Minority Community, particularly Christian Community regarding ‘The Da Vinci Code’ have come into conclusion that exhibition of the film ‘The Da Vinci Code’ is likely to cause breach of peace and hurt religious sentiments of Muslim and Christian Community, which may lead to demonstrations, disturb peace and tranquility in the State.
\end{itemize}

\textsuperscript{13} Darren J. O’Byrne, Human Rights – An Introduction 107 (Pearson Education Limited 2003).
\textsuperscript{15} The seven states are: Goa, Kerala, Meghalaya, Nagaland, Tamil Nadu, Andhra Pradesh and Punjab.
\textsuperscript{16} E.g., the State Government of Andhra Pradesh by the impugned order [G.O.Rt.No.1012, Home (General, A) Department, dated 01.06.2006] in purported exercise of the powers conferred under Section.8 of Andhra Pradesh Cinemas Regulation Act, 1955, No. 4 of 1955, suspended the exhibition of ‘The Da Vinci Code’ in English, Telugu and other languages in the entire State, with effect from the publication of the notification. The reasons recorded for the above decision as set out in the impugned notification are:

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Ranjan Dasmunshi, the Censor Board finally gave the film an ‘A’ certification and cleared it. But the Board forced the distributor, Sony Pictures to insert a 15-second legal disclaimer card\(^{18}\) both at the beginning and at the end stating that the movie was purely a tale of fiction.\(^ {19}\)

In some places the Muslims also joined hands in the protests. The storyline was alleged to be to hurt the ‘religious sentiments’ of the Muslims as well!\(^ {20}\) Meanwhile, two Public Interest Litigations were filed before the Supreme Court of India seeking for a complete ban not only on the movie but on the novel as well. Fortunately, the Court rejected the petitions.\(^ {21}\) Afterwards other High Courts also quashed the ban in the respective States.\(^ {22}\)

Exercising right to free speech, otherwise, by film personalities may impact their films. Massive controversy stirred up following Aamir Khan’s comments in support of the displaced people in Gujarat due to the Sardar Sarovar dam Project.\(^ {23}\) Immediately, the BJP Yuva Morcha (Youth Wing) orchestrated a ban on his film, ‘Rang De Basanti’ (Paint it Saffron) in the State. Nevertheless, it already ran into troubled waters because the story featured corrupt politicians involved in deals to buy low quality fighter planes which resulted in frequent crashes. The film was only cleared after a positive nod from the Defence Minister, Pranab Mukherjee and the three chiefs of the defence forces after viewing the film on the invitation from the Board.\(^ {24}\)

The same political party also called for a ban on Aamir Khan’s next film ‘Fanaa’ (Annihilation), in Gujarat, before its release. Noted Bollywood\(^ {25}\) filmmaker, Mahesh Bhatt filed a petition before the Supreme Court seeking for direction to the Government of Gujarat to take appropriate steps for peaceful screening of the film in the State.\(^ {26}\) As a matter of fact, Khan did not say anything about the dam. He only reiterated what the Supreme Court rulings have stated time and again.

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\(^ {18}\) The card reads: “The characters and incidents portrayed and the names herein are fictitious, and any similarity to the name, character or history of any person is entirely coincidental and unintentional.”


\(^ {22}\) *See infra* part IV, sec. B.

\(^ {23}\) The Sardar Sarovar Project built across the river Narmada in Gujarat is undisputedly the most controversial dam project in the country. *Narmada Bachao Andolan (NBA)* (Save Narmada Movement) led by Medha Patkar is a non-governmental organization involved with the issue for more than two decades from now. Aamir Khan, shared the common objective with NBA and wanted those displaced by the Narmada dam to be rehabilitated. This stirred a massive political debate. Consequently, the films of Aamir Khan were targeted. *See generally* Dionne Bunsha, *Heights of intolerance*, FRONTLINE, June 16, 2006, at 108.


\(^ {25}\) A metaphor used for the Bombay (now Mumbai) film world.

Unfortunately, the Supreme Court dismissed Bhatt’s petition but added that the Gujarat Government was duty bound to provide security for the hall owners if they sought police protection. Finally, it was released in only one theatre in Jamnagar in Gujarat.27

‘Water’, a 2005 movie by Deepa Mehta which is set in 1938 examines the plight of impoverished widows at a temple in Varanasi, ran into controversy with the Hindu fundamentalists. Mehta originally intended to direct ‘Water’ in February, 2000 but before filming had begun, some 2,000 protesters spearheaded by a coalition of Hindu extremists aligned with the BJP (then ruling party at the Centre) destroyed the main film set and even gave death threats to Mehta.28 Eventually the film was shot secretly with a different cast in Sri Lanka, under the title ‘River Moon’ in 2003. The film was premiered at the 2005 Toronto International Film Festival and earned wide international recognition, but unfortunately was put on hold in India. Finally, it was released in India on March 9, 2007 – seven long years after the project actually started.29

Mehta’s other films also attracted hostility from Hindu fundamentalists who have always objected to her topics. ‘Fire’ (1996) and ‘1947: Earth’ (1998) – the two other films in the trilogy with ‘Water’, also brought her into conflict with these forces. The former deals with a lesbian relationship between two married women, the latter was set in Lahore in the time period directly before and during the partition of India in 1947, depicting how once unified group of friends of mixed religion becomes divided and tragedy ensues. The extreme right-wing party, Shiv Sena (Army of Lord Shiva) organized demonstrations, forcing the closure of several Bombay and New Delhi cinemas where ‘Fire’ was shown. Members of the organization vandalized several movie halls. The film had to be withdrawn from cinemas, pending another censorship review, but later re-released uncut.30 The fundamentalists also denounced ‘Earth’ and demanded the government to ban the film.31

The Gujarat violence energized the film fraternity in India to come up with a number of movies. In the three years following the incident, more than 22 short films and documentaries projecting

the communal riots were produced.\textsuperscript{32} Not surprisingly, many of them ran into conflict with the Censor Board because of the controversial subject matter. One such film was Rakesh Sharma’s ‘Final Solution’, a study of the politics of hate. In spite of international accolades, the film was banned in India by the Censor Board for several months stating that “State security is jeopardized and public order is endangered if this film is shown”.\textsuperscript{33} The ban was finally lifted in October, 2004 after a sustained campaign.\textsuperscript{34}

On the same context, Faaiz Anwar’s film ‘Chand Bujh Gaya’ (The Moon Has Been Eclipsed) depicted a love story of a young couple -a Hindu boy and a Muslim girl - whose lives are torn apart in the riots. The Censor Board refused to certify the film because it is full of gory visuals of violence and that certain characters have definite resemblance to real life personalities and it was still a live issue by then, thus inciting communal violence. Later the Bombay High Court quashed the order of the Board. Consequently, it was released in 2005 after waging a 3 year long war.\textsuperscript{35} The court also rescued another documentary film ‘Aakrosh’ (Cry of Anguish) (2003) which brought out the agony and anguish of victims of communal riots.\textsuperscript{36}

In 2002, the film ‘War and Peace’, created by Anand Patwardhan, focusing on the dangers of nuclear war in the Indian sub-continent, was asked by the Board to make 21 cuts before it was allowed to have the certificate for release.\textsuperscript{37} The debate finally reached the court and the Mumbai High Court ordered the Censor Board to issue a ‘U’ certificate without imposing cuts or making additions to the footage.\textsuperscript{38}

In 1999, orchestrated by Tamil Nadu’s Dravida Munetra Kazhagam (DMK, Dravidian Progress Federation) Government, a coalition partner in then BJP-led NDA government, the police arrested two men for holding a preview of the documentary, ‘Death of a River’ to writers, journalists and intellectuals. The film dealt with the police massacre of striking Manjolai tea estate workers at the Thamiraparani River which resulted in killing of 17 people.\textsuperscript{39}

‘Black Friday’ (2004), directed by Anurag Kashyap, encountered a peculiar situation and that too after being cleared from all hurdles. The film tries to recreate the events and the intense feelings


\textsuperscript{34} \textit{Final Solution}, http://www.rakeshfilm.com/finalsolution.htm.

\textsuperscript{35} \textit{See infra} part IV, sec. B for the Court’s judgment.

\textsuperscript{36} \textit{See infra} note 109 and accompanying text for the Court’s judgment.


\textsuperscript{38} \textit{See infra} note 108 and accompanying text for the Court’s judgment.


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that followed the infamous 1993 Bombay blasts.\textsuperscript{40} It was granted censorship certificate on the condition that the makers would insert a disclaimer right at the beginning of the screening of the movie that it was based on a book and did not impute any innocence or guilt on any of the personalities depicted in the film.\textsuperscript{41} When it was due to be released in December 2004, one of the accused in the bomb blasts case, Mushtaq Moosa Tarani, tried by the designated court under the Terrorists and Disruptive Activities (Prevention) Act (TADA), 1987, No. 28 of 1987, filed a petition before the Bombay High Court challenging the release of the film. He contended that the film, based on a book by journalist S. Hussein Zaidi,\textsuperscript{42} gave the perception that it was the authentic version of the events and this could bias the public opinion. The argument was upheld by the High Court and later on by the Supreme Court. Hence the release of the film was stalled. Finally, after the TADA court delivered its judgment in December 2006 and found the petitioner guilty, the film was released in India on February 9, 2007.\textsuperscript{43} In the meantime, it had already received a lot of critical acclaim at film festivals abroad. The irony is that the book on which the film was based was in open acclaim since its publication in 2002.\textsuperscript{44}

The list of the films is not exhaustive but only a tip of the iceberg. There are numerous such instances where films got into trouble dealing with themes which are thought-provoking. However, the phenomenon is not new altogether. Only few recent films have been cited above to show the present nature and extent of the problem. Past films have also been targets of community and government ire. Many years back in the 1970s, two films – ‘Aandhi’ (The Storm) and ‘Kissa Kursi Kaa’ (A Tale of Throne) were perceived to have depicted the life story of the then-Prime Minister Indira Gandhi, for which they suffered similar fate. The latter was denied a censor certificate and the former was withdrawn from the cinema halls. ‘Aandhi’ was re-released a few weeks later when Gandhi herself cleared it after consulting some critics.\textsuperscript{45} In contrast, ‘Kissa Kursi Kaa’ turned out to be the most controversial film ever made in the history of Indian cinema. The film was accused of scathing criticism of the functioning of the Central Government under Gandhi. The film reel was burnt by the then ruling party minister and the film had to be re-shot.\textsuperscript{46} In fact, national film industry had a torrid time during Emergency\textsuperscript{47} in

\textsuperscript{40} It is widely believed that in retaliation of the destruction of the historic Babri Mosque in 1992, there was a series of 13 bomb explosions that took place in Bombay on March 12, 1993. The coordinated attacks were the most destructive bomb explosions in Indian history leaving 257 civilian fatalities and 713 injuries officially. See generally 1993 Bombay bombings, Wikipedia.org, http://en.wikipedia.org/wiki/1993_Mumbai_bombings (last visited Jul. 20, 2008); 1993: Bombay hit by devastating bombs, BBC NEWS, http://news.bbc.co.uk/onthisday/hi/dates/stories/march/12/newsid_4272000/4272943.stm (last visited Jan. 4, 2010).


\textsuperscript{42} The original name was same as the book: ‘Black Friday – The True Story of the Bombay blasts’.


\textsuperscript{44} Id.

\textsuperscript{45} Id.

\textsuperscript{46} Srinath, supra note 27.

\textsuperscript{47} A case was registered and the Sessions Court, Delhi found the accused guilty. However, the Supreme Court overruled the decision. See generally V.C. Shukla v. State (Delhi Administration), A.I.R. 1980 S.C. 1382.
1970s invoked by Gandhi’s Congress Government. The industry was put under intense pressure to aid the Government’s propaganda campaigns. Film makers and artists who refused to co-operate were blacklisted, and films were denied exhibition certificates by the Censor Board.48

Although Emergency days are long over, the film fraternity in India is yet to breathe easy. In 1994, the Government of India was in the process of formulating new guidelines for the film producers seeking not only to eliminate vulgarity and violence in films but also denigration of ministers and public officers. Fortunately, it got nowhere. But it has not stemmed such efforts. Recently, the Mumbai unit of the Bahujan Samaj Party (BSP)49 has sent a note to the Indian Motion Picture Producers’ Association and the Indian Film Directors’ Association asking them to get in touch with the party for permission before they make any film on either the BSP founder, Kanshi Ram or the Uttar Pradesh Chief Minister, Mayawati. If such a claim is made and no permission in fact is accorded, opposition would be justified.50

All those incidents reflect the despotic and arbitrary nature of the authorities, various groups or political parties and their die-hard efforts to curb the freedom of speech and expression through films which fell out of their taste. The filmmakers, to exercise one of the most coveted right, had to depend either upon the whims and fancies of those elements or to fight prolonged legal battles with great deal of uncertainty.

III. HISTORICAL DEVELOPMENT OF FREE SPEECH

The right to free speech is one of the most celebrated as well as vigorously guarded civil liberties from any sort of governmental intrusion. The voyage to safeguard free speech did not have an abrupt beginning with the Constitution of India. In the era of India’s struggle for independence from the British rule, right to free speech was given enormous importance by the national leadership. Rigorous campaigns were organized to ensure the freedom of press against several repressive laws.51 Political trends and groups otherwise critical of each other and often at opposite ends of political and ideological spectrum vigorously defended each others’ civil rights. The Moderates defended the Extremist leader Bal Gangadhar Rao Tilak’s right to speak and write what he liked. Further, the Karachi Convention of the Congress in 1931, passed a resolution on Fundamental Rights which, inter alia, guaranteed right of free expression of

47 A proclamation of Emergency was issued under the provisions of the Constitution in December 1971, as a result of Indo-Pakistan war on the ground of ‘external aggression’. While the 1971 proclamation was still effective, another proclamation was issue on June 26, 1975 on the ground of ‘internal disturbance’ threatening the security of the country. Both the proclamations were finally revoked in March 1977. See generally Venkat Iyer, STATES OF EMERGENCY: THE INDIAN EXPERIENCE (Butterworths 2000).
48 Madhavi Goradia Divan, FACETS OF MEDIA LAW 46 (Eastern Book Company 2006).
49 The bastion of BSP is the State of Uttar Pradesh. It claims to represent ‘Bahujans’ or the oppressed classes.
51 See generally Divan, supra note 48, at 292-307.
opinion through speech and Press. Such an illustrious history ensured that freedom of
expression became a fundamental right in the Constitution.

To understand the scope of right to free speech as embodied in the Constitution, it is pertinent to
explore the debates that took place at the Constituent Assembly (hereinafter Assembly), which
was formed to draft the Constitution of India. To assist the Assembly, several sub-committees
were set up on different subjects, which were obliged to report to the Assembly. One such sub-
committee was Fundamental Rights Sub-Committee. There was little disagreement among the
members on principles, what disagreement there was centered primarily on the classic predicament of the degree to which personal liberty should be infringed to secure governmental
stability and public peace, of how conditional the statement of a right should be. About the
need to circumscribe the basic freedoms of speech, assembly, association, etc., was no easy
agreement. The issue was always delicate and explosive question of freedom versus State
security and, to a lesser extent, of liberty versus license in individual freedom. The political
unrest, communal riots engulfed the new-born nation in such an unprecedented manner that it
paved the way for the introduction of limitation of rights and even their suspension in times of
Emergency when the security of the nation or part of it was threatened, in the draft document on
Fundamental Rights.

As far as the Draft Constitution is concerned, Article 13 was analogous to Article 19 of the
present Constitution. Several members of the Assembly’s Drafting Committee vouched for more
authority in the hands of the legislature on the restriction of those freedoms while some other
professed a very liberal view calling for the deletion of all the restrictive clauses under Article
13(2) to (6). After grueling debate among the members, Article 13(2) as a restrictive clause on
free speech was finally passed (and adopted as Article 19(2) in the Constitution), which declared
that the freedom of speech and expression shall not affect “the operation of any existing law, in
so far as it relates to, or prevent the State from making any law on matters concerning libel,
slander, defamation, contempt of court, any matter offending decency and morality, or
undermines the security of or tends to overthrow, the State”. To comprehend the backdrop of
this clause, it is relevant to demonstrate some parts of the fascinating debate. Initially, one of the
grounds proposed under Article 13(2) was ‘sedition’ but it was not finally approved. Advocating
for the deletion of the same, K.M. Munshi, Member of the Drafting Committee, opined:

53 It was convened on December 9, 1946.
54 See Granville Austin, The Indian Constitution: Cornerstone of a Nation 61-63 (Oxford University
55 See id. at 69-71.
56 Article 13(1) embodied several freedoms regarding speech and expression, peaceful assembly, form associations,
move and reside in any part of the nation, etc.
57 See infra note 74.
58 7 Constitutional Assembly Debates (C.A.D.) at 786.
Our notorious Section 124A\textsuperscript{59} of Penal Code\textsuperscript{60} was sometimes construed so widely that I remember in a case a criticism of a District Magistrate was urged to be covered by Section 124A. \textit{But public opinion has changed considerably since and now that we have a democratic Government, a line must be drawn between criticism of Government which should be welcome and incitement which would undermine the security or order on which civilized life is based, or which is calculated to overthrow the State. Therefore the word ‘sedition’ has been omitted. As a matter of fact the essence of Democracy is criticism of Government. The party system which necessarily involves an advocacy of replacement of one Government by another is its only bulwark; the advocacy of different system of government should be welcome because that gives vitality to a democracy.}\textsuperscript{61} (Emphasis added)

Among the other members who vehemently opposed the adoption of the restrictive clauses was Sardar Hukum Singh. He argued that freedoms enshrined in Article 13(1) gave protection to the individual against coercive force of the State, if they stood by themselves. But the restrictions appeared “to take away the very soul out of those protective clauses”.\textsuperscript{62} He argued that the rights under Article 13(1) could not be alienated by individual, even voluntarily. He was disillusioned by the fact that the freedoms had been made so precarious and entirely left at the mercy of the legislature, which is “nothing beyond one political party” and hence, drew inferences from other civilized countries in favour of greater scope of judicial review.\textsuperscript{63}

Another member, Mahboob Ali Baig went ahead to compare the situation with the German Constitution under Adolf Hitler, where Fundamental Rights were subjected to the provisions of law made by the legislature. \textit{“This means the citizens could only enjoy those rights which the legislature would give them, permit them from time to time. That cuts at the very root of Fundamental Rights and the Fundamental Rights cease to be fundamental.”}\textsuperscript{64}

Finally, the proposed amendment to delete those restrictions failed to get consensus. Many members were of the opinion that full freedom did not mean that it was unrestricted. So, freedom of speech would not mean to speak out at one’s own will. “Freedom by its nature implies

\textsuperscript{59} \textit{India Pen. Code} sec. 124A Sedition. —Whoever, by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, the Government established by law in India, shall be punished with imprisonment for life, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.

\textsuperscript{60} \textit{India Pen. Code}, 1860, No. 45 of 1860, is the principal criminal law in India till date.

\textsuperscript{61} 7 C.A.D., at 731.

\textsuperscript{62} \textit{Id.} at 732.

\textsuperscript{63} \textit{Id.} at 732-33.

\textsuperscript{64} \textit{Id.} at 728 (emphasis added).
limitations and restrictions.”\textsuperscript{65} The political unrest, communal riots in different parts of the country also worked as a catalyst in the argument and paved the way not only for the introduction of the limitation clauses during normal times but suspension of them altogether during Emergency. However, in each of the Clauses (3) to (6) of Article 13, ‘restriction’ was qualified by insertion of the word ‘reasonable’ preceding it. Thus, liberty had scored a triumph over bureaucracy’s desire for maximum security. The Constitution placed a major restriction on the scope of legislative competence which has led the judiciary to review the reasonableness of the restrictions imposed on the rights. Thus the Indian judges acquired the same power in relation to those freedoms which the American judges generally enjoy under the ‘due process of law’ clause.\textsuperscript{66} Surprisingly, for reasons unexplained, similar insertion was not carried out in relation to Article 13(2). Hence, the scope of judicial review remained limited in case of freedom of speech and expression compared to its counterparts. This was remedied a year later when the First Amendment\textsuperscript{67} to the Constitution was passed in June, 1951 and given retrospective effect after much deliberation and debate in the Parliament. This amendment along with the Sixteenth Amendment\textsuperscript{68} in 1963 modified the grounds of the original Article 19(2) to bring it to the present shape and form.\textsuperscript{69}

Unfortunately, the liberal line of the thought professed by some of the members was not only defeated in the Assembly, after more than five decades, the National Commission to Review the Working of the Constitution (NCRWC)\textsuperscript{70} failed to show any such innovation. The NCRWC recommended to include “the freedom of press and other media, the freedom to hold opinions and to seek, receive and impart information and ideas” under Article 19(1)(a);\textsuperscript{71} it also proposed to amend Article 19(2) by inserting further restriction on the ground of “preventing disclosure of information received in confidence except when required in public interest”.\textsuperscript{72}

\textbf{IV. LEGAL POSITION OF CENSORSHIP IN INDIA}

\textbf{A. Statutory law}

Unlike the First Amendment to the US Constitution, which unequivocally declares: “Congress shall make no law . . . abridging the freedom of speech, or of the press”,\textsuperscript{73} constitutional

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\textsuperscript{65} Id. at 767-68 (Opinion of Algu Rai Shastri).
\textsuperscript{66} See generally AUSTIN, supra note 54, at 71-74.
\textsuperscript{67} Constitution (First Amendment) Act, 1951.
\textsuperscript{68} Constitution (Sixteenth Amendment) Act, 1963.
\textsuperscript{70} It was constituted during the regime of the NDA Government under the chairmanship of Justice M.N. Venkatachaliah, former Chief Justice of India.
\textsuperscript{71} This provision guarantees the citizens of India freedom of speech and expression.
\textsuperscript{72} 1 REPORT OF NATIONAL COMMISSION TO REVIEW THE WORKING OF THE CONSTITUTION 60-61 (2002).
\textsuperscript{73} U.S. CONST. amend. I.
\end{flushright}
guarantee of free speech in India is somewhat restricted. Article 19(1)(a) of the Constitution of India promises right to free speech and expression to all the citizens. However, ‘reasonable restriction’ can be imposed on the enjoyment of this freedom by the State under clause 2 of Article 19 on certain grounds, i.e., the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offense. Additionally, freedoms under Article 19 of the Constitution can be suspended during the Emergency by virtue of Article 359. The Constitution does not specifically speak about any medium of communication. The jurisprudence that has developed through case laws in this respect has encompassed the press, motion pictures, advertisements etc. within its fold. So far censorship of films in India is concerned, the power of legislation is vested with the Parliament under Entry 60 of the Union List (or List I) of the Schedule VII of the Constitution. The States are also empowered to make laws on cinemas under Entry 33 of the State List (or List II) but subject to the provision of the central legislation. The prime legislation in this respect is the Cinematograph Act, 1952, No. 37 of 1952, (hereinafter 1952 Act) and the Cinematograph (Certification) Rules, 1983, Gen. S.R. 381(E) (hereinafter Rules).

The 1952 Act was enacted to provide for the certification of cinematograph films for exhibition and for regulating their exhibition. The brief scheme of the statute is as follows. It empowers the Central Government to constitute a Censor Board consisting of members, numbering between 12 and 25, for the purpose of sanctioning films for public exhibition. After examination of a film, the Board either sanctions the film for restricted or unrestricted public exhibition; or directs to carry out necessary modifications; or refuse to sanction the film for public exhibition. Section 5-B(1) provides the grounds for the restriction for public exhibition which is in consonance with

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74 INDIA CONST. art. 19, cl. 1. Protection of certain rights regarding freedom of speech, etc. – All citizens shall have the right – (a) to freedom of speech and expression; (b) to assemble peaceably and without arms; (c) to form associations or unions; (d) to move freely throughout the territory of India; (e) to reside and settle in any part of the territory of India; and [(f) to acquire, hold and dispose property] [This has been deleted by the Constitution (Forty-Second Amendment) Act, 1976. Though right to property ceased to be a fundamental right but remained as a constitutional right under Art. 300A] (g) to practise any profession, or to carry on any occupation, trade or business.

75 According to this provision, where a Proclamation of Emergency is in operation, the President may by order suspend the right to move any court for the enforcement of the rights conferred by Article 19 (and certain other fundamental rights) and all proceedings pending in any court for the enforcement of such rights shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order.

76 Sanctioning of cinematograph films for exhibition.

77 Consists of subject matters in which the Central Government is empowered to legislate.

78 Theatres and dramatic performances; cinemas subject to the provisions of entry 60 of List I.

79 Consists of subject matters in which the State Government is empowered to legislate.
Article 19(2) of the Constitution. Section 5-B(2) empowers the Central Government to devise necessary guidelines in this regard. The party concerned is given an opportunity to represent his views on the subject before the Board arrives at its decision on censorship. Earlier the appeals from the orders of the Board were preferred before the Central Government. Subsequently, in 1974 by an amendment to the Act the appellate jurisdiction of the Central Government was transferred to an independent Film Certification Appellate Tribunal (FCAT). Such tribunal is competent to hear appeals from the Board. It shall consist of a Chairman and maximum of 4 other members. The Chairman shall be a retired or qualified to become a Judge of a High Court. Other members, in the opinion of the Central Government, shall be qualified to judge the effect of films on the public. However, the Cinematograph (Amendment) Act, 1981, No. 49 of 1981, substantially amended the Act to diminish the powers of the FCAT. The Central Government is now vested with revisional powers under Section 6(1), even of its own motion, to call for the record of any proceeding before the Board or FCAT in relation to any film at any stage, except a matter of appeal pending before the FCAT, to give necessary order and the Board must dispose it off in conformity with such order. The second proviso to this section enabled the Government not to disclose any fact in this respect which it considers to be against public interest. Penalties are also prescribed for contravention of the requirements of the Act. Under Part III of the 1952 Act, which deals with licensing for exhibition, section 13 empowers the Central Government or the Local Authority to suspend exhibition of a film in a Union Territory, as a whole or part of it, or a district of a State, as the case may be, where it may likely to cause breach of peace. The 1952 Act also provides for the establishment of Advisory panels by the Central Government at regional offices consisting of persons qualified to judge the effect of the films on the public.

The Rules have been framed under Section 8 of the 1952 Act. The Rules deal with the procedural details of Board, the Examining Committee, Revising Committee, the FCAT and related matters. It may be stated in this regard that under Rule 11, it specifically imposes a duty on the Board to assess public reactions to films. This may be done by holding symposia or seminars of film critics, film writers, community leaders and persons associated with the film industry, and also by undertaking local or national surveys to study the impact of films in the public mind.

B. Judicial Intervention

Over the years, the Supreme Court and the High Courts through various judgments have contributed immensely in safeguarding the rights of the people of India. Right of free speech and

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80 The guidelines were revised in the year 1991. See generally Central Board of Film Certification Guidelines, http://www.cbfcindia.tn.nic.in/guidelinespage1.htm.
82 1952 Act sec. 5-C.
83 1952 Act sec. 5-D.
85 1952 Act sec. 5.
expression through motion pictures, is no exception. In this section, some of the important judgments related to films and documentaries, including few telecasted as television serials, are critically examined to assess the impact of the judiciary.

For the first time before the Supreme Court the constitutionality of censorship under the 1952 Act along with the Rules framed under it was challenged in the case of *K.A. Abbas v. Union of India*. 86 The Supreme Court upheld the constitutionality within the ambit of Article 19(2) of the Constitution and added that films have to be treated separately from other forms of art and expression because a motion picture is “able to stir up emotions more deeply than any other product of art”. 87 At the same time it cautioned that it should be “in the interests of society”. 88 “If the regulations venture into something which goes beyond this legitimate opening to restrictions, they can be questioned on the ground that a legitimate power is being abused.” 89

Probably, the most important case regarding the problem dealt herein is the case of *S. Rangarajan v. P. Jagjivan Ram*. 90 In the instant case, the decision of the Madras High Court which revoked the ‘U-Certificate’ issued to a Tamil film called ‘Ore Oru Gramathile’ (In One Village), was challenged through an appeal before the Supreme Court. In the meantime, the film had already won National Award. The film criticized the reservation policy in jobs as such policy is based on caste and was unfair to the Brahmins. 91 It was argued through the film that economic backwardness and not the caste should be the criterion. The High Court had held that the reaction to the film in Tamil Nadu is bound to be volatile considering the fact that a large number of people in Tamil Nadu have suffered for centuries. Certain remarks were also made against Dr. B.R. Ambedkar 92 and several Tamil personalities. The Supreme Court overruled the High Court decision and upheld the freedom of speech and expression. It stated. 93

The democracy is a Government by the people via open discussion. The democratic form of government itself demands its citizens an active and intelligent participation in the affairs of the community. The public discussion with people participation is a basic feature and a rational process of democracy which distinguishes it from all other forms of government. The democracy can neither work nor prosper unless people go out to share their views. The truth is that public discussion on issues relating to administration has positive value.

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87 Id. at 489.
88 Id. at 495.
89 Id. (emphasis added).
91 Caste wise they occupy the highest strata of the Indian society.
92 He is considered as the vanguard of Dalit (people belonging to the lowest strata of the society) against social oppression.
The Court went on to add:

Movie is the legitimate and the most important medium in which issues of general concern can be treated. The producer may project his own message which the others may not approve of it. But he has a right to ‘think out’ and put the counter appeals to reason. It is a part of a democratic give-and-take to which no one could complain. The State cannot prevent open discussion and open expression, however, hateful to its policies.\(^94\)

In doing so, the Court did acknowledge to have a compromise between the interest of freedom of expression and social interests. Censorship is permitted only on the grounds envisaged under Article 19(2) and the standard of judging a film to be applied by the Board or courts should be that of “an ordinary man of common sense and prudence and not that of an out of the ordinary or hypersensitive man”.\(^95\) It went on to observe that the anticipated danger should not be remote, conjectural or far fetched but should have proximate and direct nexus with the expression and equivalent of a “spark in a powder keg”.\(^96\) The Court criticized the State and emphasized that freedom of expression cannot be suppressed on account of threat of demonstration and processions or threats of violence. “\textit{It is the duty of the State to protect the freedom of expression since it is a liberty guaranteed against the State. The State cannot plead its inability to handle the hostile audience problem.}”\(^97\)

There is no separate censorship required for television serials or films as they are telecasted only if they are certified by the Board. An incident came up concerning a television serial ‘Tamas’ (Darkness) which depicted the Hindu-Muslim and Sikh-Muslim tension before the partition of India.\(^98\) Appeal was preferred before the Supreme Court against the judgment of Bombay High Court (which allowed the screening of the serial) in \textit{Ramesh v. Union of India}\(^99\) to restrain the screening of the serial as it was violative of Section 5B of the 1952 Act. It was alleged by the petitioner that the screening of the serial on \textit{Doordarshan} (the State television network) would be against public order and it was likely to incite the people to indulge in the commission of the offences. The Supreme Court affirmed the High Court decision and dismissed the petition. Commenting on the reaction of the average men, the Court held that the average person would learn from the mistakes of the past and perhaps not commit those mistakes again. They concurred with the High Court that “… [I]litterates are not devoid of common sense … [and] …

\(^{94}\) \textit{id.} at 593.  
\(^{95}\) \textit{id.} at 586.  
\(^{96}\) \textit{id.} at 595-96.  
\(^{97}\) \textit{id.} at 598-99 (emphasis added).  
\(^{98}\) It was based on a book written by Bhisham Sahni.  
. [a]wareness in proper light is a first step towards that realization”.\textsuperscript{100} Incidentally, the serial was given ‘U’ certificate by the Board.

In \textit{Sree Raghavendra Films v. Government of Andhra Pradesh},\textsuperscript{101} the exhibition of the film ‘Bombay’ in its Telugu (the official language in the State of Andhra Pradesh) version was suspended in exercise of the powers u/Sec.8(1) of the A.P. Cinemas Regulation Act,\textsuperscript{102} despite being certified by the Censor Board for unrestricted exhibition. The suspension was imposed citing the cause that it may hurt sentiments of certain communities. The Court discovered that the authorities who passed the impugned order did not even watch the movie! Hence, the Court quashed the order as being arbitrary and not based on proper material.

In another case, \textit{Doordarshan} refused to telecast a documentary film on the Bhopal Gas Disaster titled ‘Beyond Genocide’, in spite of the fact that the film won Golden Lotus award, being the best non-feature film of 1987 and was granted ‘U’ certificate by the Censor Board. The matter came before the Supreme Court in the case of \textit{Life Insurance Corporation of India v. Prof. Manubhai D. Shah}.\textsuperscript{103} The reasons cited by \textit{Doordarshan} were \textit{inter alia}, the political parties had been raising various questions concerning the tragedy, and the claims for compensation by victims were \textit{sub judice}. Upholding the freedom of speech and rejecting the abovementioned arguments, the Court held: “... Merely because it is critical of the State Government ... is no reason to deny selection and publication of the film. So also pendency of claims for compensation does not render the topic \textit{sub-judice} so as to shut out the entire film from the community.”\textsuperscript{104} The Court made it clear that subject to Article 19(2), a citizen has a right to publish, circulate and disseminate his views to mould public opinion on vital issues of national importance. Hence, any attempt to thwart or deny the same would offend Art. 19(1)(a). Under such circumstances, the “burden would, therefore, heavily lie on the authorities that seek to impose them to show that the restrictions are reasonable and permissible in law”.\textsuperscript{105}

Award winning documentary film, ‘In Memory of Friends’ by Anand Patwardhan about the violence and terrorism in Punjab, though granted ‘U’ certificate by the Censor Board, was rejected by \textit{Doordarshan} reasoning that if such documentary is shown to people, it would create communal hatred and may lead to further violence. The Bombay High Court quashed the order emphasizing: “Everyone has a fundamental right to form his own opinion on any issue or general concern. He can form and inform by any legitimate means.”\textsuperscript{106}

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\textsuperscript{100} \textit{Id.} at 679.
\textsuperscript{101} 1995 (2) A.L.D. 81.
\textsuperscript{102} Same provision was invoked to ban ‘The Da Vinci Code’ in the State of Andhra Pradesh.
\textsuperscript{103} A.I.R. 1993 S.C. 171.
\textsuperscript{104} \textit{Id.} at 186-87.
\textsuperscript{105} \textit{Id.} at 186.
\textsuperscript{106} Anand Patwardhan v. Union of India, A.I.R. 1997 Bom. 25, 32.
\end{flushleft}
In case of ‘War and Peace’, Patwardhan appealed before the FCAT against the decision of the Board.\textsuperscript{107} The FCAT viewed the film and directed issuance of ‘U’ Certificate, provided that Patwardhan carried out two cuts and one addition as per its order. He challenged the order before the Bombay High Court. In its conclusion, the High Court was very candid to hold that the cuts recommended by FCAT were merely to harass the petitioner. Regarding addition, the Court observed that it must be left to the discretion of the filmmaker.\textsuperscript{108}

As already acquainted with the fact that many of the movies on Gujarat riots ran into controversy with the Censor Board, they required the Court’s assistance to see the light of the day. Allowing the film, ‘Aakrosh’, the Bombay High Court aptly reasoned that riots were a part of history by then and hence:

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\ldots \text{[W]hen the hour of conflict is over it may be necessary to understand and analyze the reason for strife. We should not forget that the present state of things is the consequence of the past; and it is natural to inquire as to the sources of the good we enjoy or for the evils we suffer.}\textsuperscript{109}
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In another case, while overruling the FCAT’s order to censor the movie, ‘Chand Bujh Gaya’, the Bombay High Court in \textit{F.A. Picture International v. Central Board of Film Certification}\textsuperscript{110} opined: “Censorship in a free society can be tolerated within the narrowest possible confines and strictly within the limits which are contemplated in a constitutional order.”\textsuperscript{111} (Emphasis added)

It strongly criticized the role of the concerned authorities:

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\ldots \text{The view of the censor does no credit to the maturity of a democratic society by making an assumption that people would be led to disharmony by a free and open display of a cinematographic theme. The certifying authority and the Tribunal were palpably in error in rejecting the film on the ground that it had characters which bear a resemblance to real life personalities. The constitutional protection under Article 19(1)(a) that a film maker enjoys is not conditioned on the premise that he must depict something which is not true to life. The choice is entirely his.} \textsuperscript{112}
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In \textit{Da Vinci} controversy as well, the Supreme Court rejected the writ petition by the \textit{All India Christians Welfare Association} seeking a ban on the movie on the ground that it hurt the

\textsuperscript{107} Press Release, Icarus Films, \textit{supra} note 37.
\textsuperscript{108} Anand Patwardhan v. Cent. Bd. of Film Certification, 2004 (1) MAH. L.J. 856.
\textsuperscript{109} Ramesh Pimple v. Cent. Bd. of Film Certification, 2004 (3) MAH L.J. 746, 750.
\textsuperscript{110} A.I.R. 2005 Bom. 145.
\textsuperscript{111} \textit{id.} at 148.
\textsuperscript{112} \textit{id.} at 150.
religious sentiments of Christians. The court found no point of objection when the Censor Board and the Central Government has given a green signal. It also held that that no predominantly Christian country had banned the film and there has been no definite reason forwarded by the petitioners to ban the movie in India. In the States of Andhra Pradesh, Kerala and Tamil Nadu, the respective High Courts quashed the bans imposed by the State Governments and also imposed costs on the governments. Upholding the right to freedom of speech and expression, the Courts found the act of Governments ‘irrational’ and ‘unconstitutional’. They were of the opinion that the bans were imposed mechanically due to the veto of a few sections of people who objected rather than arriving at a decision based on informed satisfaction.

In all those cases of Da Vinci, it was alleged that the film violated inter alia, Article 25 of the Constitution with respect to the Christian community. Particularly in the case of Tamil Nadu, the Madras High Court was of the opinion that for a harmonious interpretation of Articles 25 and 19, it is clear from a reading of those provisions that the rights under Article 25 are subject to the other provisions of Part III; which means they are subject to Article 19(1). It was also not clear before the court how the exhibition of the film will interfere with anyone’s freedom of conscience or the right to profess, practise and propagate a particular religion. Moreover, the Court expressed that under no circumstances ‘blasphemy’ is a ground under Article 19(2). The reasoning makes greater sense when no empirical evidence across the world has also proved the right to freedom of religion is better served, or protected with or through blasphemy laws.

Another interesting aspect of this phenomenon is that irrespective of the effect of the movies, there is often a call for a total ban without exploring any other possibilities. The Supreme Court in State of Gujarat v Mirzapur Moti Kureshi Kassab Jamat stated that a total prohibition under Article 19(2) to (6) must also satisfy the test that a lesser alternative would be inadequate.

The aspect of right of the viewers with regard to freedom of information has not gone unnoticed by the Courts. Freedom of information is, of course, inseparable from freedom of speech. If a speaker cannot express a view, then hearer cannot receive information. In the case of Secretary,
Ministry of I & B v. Cricket Association of Bengal, it was held by the Supreme Court that freedom of speech and expression includes “right to acquire information and to disseminate it to public at large”. Hence, Article 19(1)(a) also includes the right of viewers. Further, in Indian Express Newspapers (Bombay) Pvt. Ltd. v. Union of India, it was held by the Supreme Court that the people have a right to be informed of the developments that take place in a democratic process.

Finally, it is important to note that in the case of Union of India v K.M. Shankarappa, the Supreme Court disapproved of the Government retaining powers by enacting Section 6(1) of the 1952 Act and declared it ultra vires the Constitution. It held:

... The Government has chosen to establish a quasi-judicial body which has been given the powers, inter alia, to decide the effect of the film on the public. Once a quasi-judicial body like the Appellate Tribunal [FCAT], consisting of a retired Judge of a High Court or a person qualified to be a Judge of a High Court and other experts in the field, gives its decision that decision would be final and binding so far as the executive and the Government is concerned. ... The executive has to obey judicial orders. Thus, Section 6(1) is a travesty of the rule of law which is one of the basic structures of the Constitution. ... The Executive cannot sit in an appeal or review or revise a judicial order. (Emphasis added)

It emphasized that the only way to nullify the Court order would be through appropriate legislation. Otherwise, “... the Government may apply to the Tribunal itself for a review, if circumstances so warrant. But the Government would be bound by the ultimate decision of the Tribunal.”

On the apprehension of law and order problem, the Court reminded the Government about their duty:

... In any democratic society there are bound to be divergent views. Merely because a small section of the society has a different view from that as taken by the Tribunal, and choose to express their views by unlawful means would be no ground for the Executive to review or revise a decision of the Tribunal. In such a case, the clear duty of the Government is to ensure that law and order is

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122 (2001) 1 S.C.C. 582.
123 Id. at 585.
124 Id.
maintained by taking appropriate actions against persons who choose to breach the law.\(^{125}\)

C. International Law and its Significance to India

Provision on freedom of speech and expression is also enshrined under Article 19 of the Universal Declaration of Human Rights (UDHR)\(^ {126}\) as well as the International Covenant of Civil and Political Rights (ICCPR)\(^ {127}\). Article 19(2) of the ICCPR states that such freedom is not only limited to “impart information and ideas of all kinds”, but also freedom to “seek” and “receive” them “regardless of frontiers” and in whatever medium, “either orally, in writing or in print, in the form of art, or through any other media of his choice”. Often freedom of expression is considered as a cornerstone right – one that enables other rights to be protected and exercised.\(^ {128}\) As in India, this right is not absolute in almost all the countries; States always prohibit certain types of expressions. According to the General Comments on Article 19 by the Human Rights Committee, so far as restrictions on free speech and expression are concerned, they are required to conform to two conditions: they must be provided by law and necessary for legitimate purposes. Such purposes include protection of the rights and reputations of others, the protection of national security and public order and morals.\(^ {129}\) When a State party imposes certain restrictions on the exercise of freedom of expression, it may not put in jeopardy the right itself. It is the interplay between the principle of freedom of expression and such limitations and restrictions which determines the actual scope of the individual’s right.\(^ {130}\) The only duty of the States in the context of restricting freedom of expression is to prohibit by law “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. . . “.\(^ {131}\) Thus, it can be concluded that a State should ensure to make all possible effort to guarantee right to the freedom of speech and expression. It is applicable in case of motion pictures as well and hence, if at all, censorship or restriction is imposed, it should meet the three-part test set out in Article 19 of the ICCPR i.e. (a) it is provided by law; (b) it pursues a legitimate aim; and (c) it is necessary in a democratic society.\(^ {132}\)

Incidentally, India is a party to the UDHR and has ratified the ICCPR. International treaties are not self-executing in case of India. For the successful implementation of international laws in the domestic legal system, they have to be transformed in to domestic law enacted by a legislative

\(^{125}\) *Id.* at 585-86.


\(^{129}\) See ICCPR art. 19, para 3.


\(^{131}\) ICCPR art. 20, para 2.

\(^{132}\) Callamard, *supra* note 118, at 11.
act of the Parliament.\textsuperscript{133} Nevertheless, the Supreme Court of India has made commendable efforts in respecting the provisions of the international instruments. The Supreme Court in the case of \textit{Vishaka v. State of Rajasthan}\textsuperscript{134} observed that the applicability of the UDHR and principles thereof may have to be read, if need be, into the domestic jurisprudence. The Court also summed up the implications of international law through the following words:

Any International Convention not inconsistent with the fundamental rights [enshrined in the Constitution of India] and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee. This is implicit from Art.51(c)\textsuperscript{135} and the enabling power of Parliament to enact laws for implementing the international conventions and norms by virtue of Art.253 with Entry 14\textsuperscript{136} of the Union List in the Seventh Schedule of the Constitution.\textsuperscript{137}

Various provisions of the ICCPR have also been referred to in several judgments of the Supreme Court. In fact, with respect to the international human rights law in \textit{Apparel Export Promotion v A.K. Chopra},\textsuperscript{138} the Supreme Court clarified: “In cases involving violation of human rights, the courts must remain forever alive to the international instruments and conventions and apply the same to a given case where there is no inconsistency between the international norms and the domestic law occupying the field.”\textsuperscript{139}

The message of the international instruments, such as the UDHR and the ICCPR, which directs all the State parties to take appropriate measures to prevent human right violations, is loud and clear. Besides, the safeguards regarding the freedom of speech and expression, as visualized under the international human rights law have a significant legal bearing on India’s commitment towards the same.

\textsuperscript{133} INDIA CONST. art. 253. Legislation for giving effect to international agreements. – Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.

\textsuperscript{134} A.I.R. 1997 S.C. 3011.

\textsuperscript{135} INDIA CONST. art. 51. Promotion of international peace and security.— The State shall endeavour to . . . (c) foster respect for international law and treaty obligations in the dealings of organized peoples with one another . . . . This is a provision under Part IV of the Constitution, which are the ‘Directive Principles of the State Policy’ and not directly enforceable by the Courts unlike the ‘Fundamental Rights’ under Part III. However, they have been considered to be fundamental in the governance of the country and complementary to the Fundamental Rights by numerous judgments of the Supreme Court.

\textsuperscript{136} Entering into treaties and agreements and implementation of treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.


\textsuperscript{138} (1999) 1 S.C.C. 759.

\textsuperscript{139} \textit{id.} at 776.
V. FALLACY OF CENSORSHIP

The section on judicial pronouncements makes it crystal clear that as far as motion pictures are concerned, the higher courts in India have zealously guarded the freedom of speech and expression and have shown optimum judicial activism. They have refused to scrap any movie without any compelling reason for restriction and which are not based on vague or unreasonable apprehensions. Yet, this jurisprudence has at times traveled back and forth as it did in case of ‘Black Friday’. In case of ‘Fanna’, the Supreme Court actually diluted its own precedent enunciated in the Rangarajan case where it obligated the State to take necessary preventive measures pro-actively against any untoward incident that might take place with screening of any such movies. Instead, this time it approached the matter from the opposite end, where the theatre owners were asked to seek protection from the Government, only then the State has a duty to oblige. Besides, it did not pull up the Gujarat Government for its failure to enforce the release of the film by either providing adequate security or any assurance to do so. Similar incidents were witnessed in case of other films, including ‘Chand Bujh Gaya’ where the Chief Minister of Gujarat was alleged to have threatened the distributors and movie hall owners not to screen the movie.\(^\text{140}\) In fact, being well aware of such failure or apathy of the State the theatre owners in Gujarat did not venture out to screen ‘Parzania’.\(^\text{141}\) Recent non-release of ‘Deshdrohi’ in Mahararstra reasserts the existence of the typical trend.

In a democratic country everyone has a right to communicate his views on different affairs. Millions of views are circulated throughout the nation every day by different means. Many of them are not approved by majority of the Indians. But does that mean that those should be scrapped? Or do the authors have to knock the doors of the courts on every occasion if their opinions fail to satisfy a billion population? Movie is a legitimate and one of the most important medium through which general problems can be addressed. Moreover, they are not openly screened for everyone. It is available to only those people who are willing to buy tickets, go to the theatres and watch them. Unwilling people can always choose to stay away from the movies. The Sree Raghavendra Films case brings out the unfortunate truth as to how judgments on restraining movies are passed on without any material basis in this country. It would be not surprising if such is the order of the day instead being an exception. A film maker has a right to disseminate his own views which the others may not approve of but that does not deter his right to express himself and give shape through his creations. Neither all expressions of the opposing view point nor the expressions which do not find the approval of those exercising power of the State can be regarded as harmful to the State or public order.

One of the great defenders of free speech, Ronald Dworkin, has stated that there are three main reasons why free expression matters. First, we cannot accept collective control of the culture, i.e.

\(^{141}\) Siddiqui, supra note 12.
we must have the right to tell people what they do not want to hear. Second, there is an issue of
democratic transparency; where a free press has a duty and responsibility to hold government
and other powerful groups accountable. And last, there is democratic fairness; if we want people
to accept democratic procedures and laws that express the will of the majority, then everyone
must have not just a vote but a voice, however much we may dislike what they are saying.\footnote{See Ursula Owen, \textit{A free society needs free speech}, 18 \textit{EQUAL VOICES} 17, 18 (2006), available at http://eumc.europa.eu/eumc/material/pub/ev/ev18/ev-18.pdf.}
This argument of course puts the censoring of such films out of bounds. ‘Free debate’ and ‘open
discussion’ has been considered to be an integral part of a democracy in various cases.
Otherwise, democracy has no value and it is equivalent to a totalitarian regime. As noted British
columnist Polly Toynbee puts it that the best way to destroy an undesirable idea is not to brush
it under the carpet but to air it in public. The rationale consequence of providing a platform to such
a political voice is that the public will be able to ridicule it.\footnote{O’BYRNE, supra note 13, at 126.}
Regrettably, it’s not the case in our
country. The aforementioned incidents categorically assert that to feel proud of being a part of
world’s largest democracy is a farce. This is the precise reason that films with a voice of dissent
have often been sidelined from the mainstream. Furthermore, such censorship is absolutely
arbitrary and illegal with respect to the international human rights law as well. India has actually
disregarded its pledges taken before the international community by showing laissez-faire
attitude towards the implementation of the international human rights obligations in general and
Article 19 of the ICCPR in specific.

Whenever a movie falls out of the taste of the certain people exercising power, they have
orchestrated to ban the movie arbitrarily in the name of ‘public interest’. Time and again, similar
protests have been raised to restrain the exercise of the freedom. In fact, the viewers are
deprived of watching a movie simply because it does not suit a group of persons with whom they
have no link. On the contrary, they are deprived of freedom of information. In spite of the fact
that the Supreme Court taking note of this aspect, every time the viewers suffer. A practical
instance may help to understand the implication clearer as to whose interests is the protesters
advocating for. ‘The Da Vinci Code’ was banned in 7 States – the result was over 200 million
Indians in those States were deprived from viewing the movie. The total Christian population in
the country is 2.3\%, whereas the States that banned the movie has varied percentage of Christian
residents. Kerala, which holds the largest number of Christians, the book had already been
translated in Malayalam (the official language of the State) and widely circulated.\footnote{The source of population data is obtained from the official website on Census of India website,
http://www.censusindia.gov.in/. If this has been the case, then whose ‘religious sentiments’ and ‘emotions’ are involved? Only because of
protests by few organizations, the State Governments scrapped the movie taking into
consideration neither of a vast majority of the people in the States nor people of the minority
community which is projected to be against the screening of the movie. And if the justification
forwarded by the State Governments censoring the movie is put forward by other States, the movie can be banned in the whole country, in spite of Censor Board’s positive nod.

The regulation intended under Article 19(2) of the Constitution is to be so exercised so as to serve the larger public good; but unfortunately in practice, it has been manipulated on many occasions to strangle the freedom of speech and expression. The grounds mentioned therein have often been interpreted very widely to clamp down on movies at the slightest opportunity. Under such circumstances, the question arises – do we really need such restriction? After witnessing all those arbitrary attacks on the freedom of speech, it appears that ‘reasonable’ restriction really needs consideration to match up with the so-called globalized and liberal world. The above discussion makes it obvious that censorship on the motion pictures under different circumstances have not been imposed on valid constitutional or legal grounds but to serve the interests of different powerful groups whether social, religious or political. Under no circumstances, the censorship of aforementioned nature can be justified. Often the excuse of India being a diverse country with unique set of problems has been put forward and the need of restrictions has been over emphasized. But in reality the restrictions have served more in the negative sense than for positive development. The logic of public interest or public good which has been consistently used as a shield by the State while censoring films, is in several instances somewhat bizarre. Whether ‘Deshdrohi’ or the Gujarat riot films or otherwise, the State squarely failed to provide a solution to the real problem but whenever any film tried to focus the issue, it was instantaneously banned. If the State does not provide the healing touch to the victims, then at least, the State is not safeguarding anybody’s interest by censoring films.

Often the States have advanced the maintenance of ‘law and order’ as a justification for censorship. It is completely untenable. If at all, a film is to be restrained legally, it can be possible for the maintenance of ‘public order’ or protecting the ‘security of the State’. And these three concepts have been judicially distinguished from each other.145 One has to imagine three concentric circles, the largest representing ‘law and order’, the next representing ‘public order’, and the smallest representing ‘security of the State’. Hence, an act may affect ‘law and order’, but not ‘public order’; an act may affect ‘public order’, but not ‘the security of the State’.146 The Court reasoned: “The contravention of law always affects order but before it can be said to affect public order, it must affect the community or the public at large”.147 In the light of this judgment, we can assert that mere law and order problem or apprehension of the same cannot be a valid ground for film censorship.

The Censor Board is envisaged as a large expert body carefully constituted to cater to the needs of different segments of the society. Moreover, the procedure for grant of certificate of exhibition to a film is quite elaborate. So its decisions must be given full weight. Nonetheless, the role and

146 ib. at 758-59.
147 ib. at 758.
position of the Board is confusing. The members are appointed and virtually controlled by the Government. The irony is that the game is not confined to only scrapping of movies by the Board. Even a positive nod by the Board or the FCAT is not ultimate. The Central Government and at times, the State Government has the final words before it is dragged to the courts. Consequently, films had to wait for years after completion and before they are actually released.\textsuperscript{148} In the meantime, the theme of the film may lose its relevance altogether. In such circumstances, where does the importance of the Censor Board’s decisions lie? At this juncture, the judgment of Shankarappa is much needed adrenalin. The 1952 Act provides for the construction of advisory panels which can only make recommendations to the Board. In case of ‘Rang De Basanti’, the Board invited Defence Minister and people from the forces and in case of ‘The Da Vinci Code’, it invited Information & Broadcasting Minister along with representatives of the Catholic Bishops’ Conference of India for their advice; but those were the people who actually had the final say. Next time probably to make a film on the terrorists, the terror groups will be invited to certify the content. If in every case, people from respective spheres are to be called to verify the authenticity of the film and give a sort of binding advice, then there is no rationale of having a statutory expert body. The Board seems to be concerned about the impact of certain films in the public mind, but there are hardly instances where the Board organized symposia or seminars, or undertaking surveys to that effect as envisaged in the Rules of the 1952 Act. The Board also had to endure criticism from the film makers of being sympathetic towards Hindutva forces. Despite the fact, it banned films on Gujarat massacre, it approved films like ‘Gadar – Ek Prem Katha’ (Revolution – A Love Story), which consists of highly provocative dialogues directed against the Muslims.\textsuperscript{149} At least the former pieces have basis in real facts but the latter was a product of wild imagination. Actually, the Censor Board has often failed to act in an impartial and judicious manner. Because the statutory law is highly centralized and too much power has been given to the executive, it has become virtually impossible to perform impartially. The legislation was intended to put restriction on ‘reasonable’ grounds but that has opened the floodgates for protests, litigations and all sorts of arbitrary acts.

However, the most unfortunate development in the entire debate has been of the political outlook. What is puzzling is the fact that when the framers of the Constitution, like Mahboob Ali, K.M. Munshi could think of withering away with the restrictions during the troubled times of independence, why can’t we follow suit after more than half a century of freedom and democracy? In addition, the recommendation of the NCRWC is quite unfortunate. The amendment recommended to Article 19(1)(a) would have added no greater value as the Courts have already conceded the similar aspects. On the other hand, adding further grounds for restrictions under Article 19(2) is actually regressive. Not to mention, the Government of India’s

\textsuperscript{148} E.g., ‘Black Friday’ was completed in 2004 but was released in India in 2007 after 3 years. In between while it was screened for the overseas viewers, the Indians were kept at bay. Same was the fate of films like: ‘Water’, ‘Final Solution’ and many others.

effort to formulate restrictive guideline for film-makers and political censorship imposed by various political parties time and again.

The censoring of films also has some other implications. When a film is banned, it does not only affect the freedom of speech and expression of the film maker, it affects the economical aspect of many people which is also guaranteed under Article 19(1)(g)\(^{150}\) of the Constitution. Film making, distribution and screening are essential aspects of film business, if the film is banned, it affects all those aspects which definitely falls under Article 19(1)(g). In many cases, violent groups ransack theatres in protest against the screening of certain films. Such actions destroy the property of the theatre hall owners. On the contrary, the right to property is inviolable under Article 300A of the Constitution without the authority of law.\(^{151}\) Hence, to allow one’s properties to be destroyed by some group of people is a clear deprivation of the right to property guaranteed under the Constitution. Worse was the case in Andhra Pradesh where the Activists of All India Christian United Front stormed in and ransacked the premises of a multiplex in Hyderabad and forced the theatre management to stop screening of ‘The Da Vinci Code’, even after the AP High Court quashed the ban in the State.\(^{152}\) In any such case, the concerned State Governments shall be held responsible for failing in its duty to secure its people’s rights.

VI. CONCLUSION: QUEST FOR A SOLUTION

Censoring movies in the name of maintaining public peace, respecting emotions of people and similar reasons are simply ridiculous. It may give wrong message to the public through indirect interpretation. It is always the best that the viewers themselves watch it and form their own opinion. General public in a country like ours may be devoid of proper education but not always of common sense. It is groups with tampered prejudices who deliberately distort the subject matter and mislead other people to serve their own purposes. Conversely, no group takes the role of a proper guide.

Subsequent to an elaborate analysis of all those incidents, judgments and laws, the activities and rationale of having a Censor Board becomes highly debatable. If at all we need to have such a body, it needs to be more autonomous rather than to be a puppet in the hands of the Government. Besides, scrapping movies regardless of clearance from the Censor Board is not only an arbitrary act but a dangerous trend of heightened intolerance. On a whole, the higher courts in the country have done a laudable job but recurrence of similar issues is the point of debate. Hence, a permanent solution is essential. It is imperative to enact a new law. The court judgments,

\(^{150}\) INDIA CONST. art. 19, cl. 1. Protection of certain rights regarding freedom of speech, etc. – All citizens shall have the right – . . . (g) to practise any profession, or to carry on any occupation, trade or business..

\(^{151}\) INDIA CONST. art. 300A. Persons not to be deprived of property save by authority of law— No person shall be deprived of his property save by authority of law.

especially of Shankarappa and Ranarajan can act as the bacon light in that direction. In the prevailing circumstances, it is better to have a rating body than a Censor Board of the very nature we have at present. The extent of censoring power should be very limited. The most important criteria regarding such body should be that the Government can forward its suggestions/recommendations but the decision must be taken by it independently. The power of censorship delegated to the States has to be narrowed down drastically. They must satisfy the Central authority as to why the ban in their territory is indispensable and that there is no alternative left.

The power to impose restrictions is not the power which is available for exercise in an arbitrary manner or for the purpose of promoting the interest of those in power or suppressing dissent. While we enthusiastically profess right to information,\(^{153}\) we cannot sit back and ban films and thus, censor information. If artists, playwrights and film makers of India are to exercise their right to free speech appropriately, the utmost necessity is to do away with the restrictive clauses under Article 19(2). If at all, any limiting line is to be drawn in the extreme cases, it shall be left to the judiciary on which the country has reposed enormous faith since inception. Also, the judiciary has to surge off the recent hiccups and deliver consistently upholding the right as it had done all through. In case any unlawful means is adopted by any person(s) to stop screening of films, the Government has to ensure that law and order is maintained by taking appropriate actions against the person concerned. It is also bound to take necessary preventive measures. Otherwise, it should be held for contempt of court.

On a whole, the test for allowing restrictions upon free speech should strive to be somewhat more stringent. Legal restraints upon individual freedom of speech should only be tolerated where they are absolutely necessary to prevent infliction of actual harm. Therefore, it can be aptly concluded, if democracy has to evolve, that screening of films and documentaries can never be denied for reasons based on mere speculation because banning motion pictures is equivalent to banning the right of freedom of speech and expression. Some developments regarding the topic are encouraging indeed; nevertheless, we have greater heights to scale.

\(^{153}\) In India, the Right to Information Act, 2005, No. 22 of 2005, has been a path-breaking piece of legislation, which has been instrumental to empower citizens of the country in bringing out important and useful information of various types relating to the State which were so far considered ‘confidential’. The mechanism provided under the statute is used extensively throughout the country by social activists, civil society groups, and common men alike.